In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1176

NORTH DAKOTA STATE BOARD OF PHARMACY,
Petitioner,

vs.

SNYDER'S DRUG STORES, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF NORTH DAKOTA

APPENDIX

A. WILLIAM LUCAS
Counsel for Petitioner
411 North Fourth Street
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R. L. MIDDLEBROOKS, INC., 906 Cherry Street, Kansas City, Mo. 64106, 421-3030

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APPLICATION FOR PERMIT

3

BP4—1M—5-45—Homestead

Application For Permit

TO OPERATE A PHARMACY OR DRUG STORE IN NORTH DAKOTA

(This application must be accompanied with the legal fee of Thirty ($30.00) Dollars and mailed before July 1)

TO THE NORTH DAKOTA STATE BOARD OF PHARMACY,
AL DOERR, SECRETARY
1208 S. HIGHLAND ACRES ROAD
BISMARCK, NORTH DAKOTA 58501

Application is hereby made by SNYDER'S DRUG STORES, INC.
Name of applicant

215 East Excelsior Avenue, Hopkins, Minnesota 55343
Street and number, City or Town

for registration of a pharmacy and permit to conduct same at 715 East Broadway
Street and number, lot and block

Bismarck, Burleigh, North Dakota.
City or Town, County

who presents the following statements in support of right to be granted registration and permit and represents that if such permit is granted, such place will be conducted in full compliance with Chapter 103, S. L. of 1937, with existing laws, and with the regulations of the Board of Pharmacy. If any statements hereinafter made are found to be false, the Board of Pharmacy is authorized to cancel and revoke the permit issued upon this application.

1. Name or title under which the Pharmacy is to be carried on: SNYDER'S DRUG STORES, INC.

2. Number of present permit, if renewal application: N/A
Give present permit number

3. If corporation, give names and addresses of principal officers and manager in charge: See paragraphs 4, 5 and 6 of supporting affidavit

4. If partnership, give names and addresses of all active partners: N/A

5. If individually owned, give name and address of owner: N/A

6. Names and certificate numbers of registered pharmacists employed, including employer, if a registered pharmacist:
Kenneth M. Swanson — No. 2600
Patricia Ann Caswell — No. 2956
— No.
— No.
— No.
Give name and certificate number of each

7. Names of all unregistered employees: None

8. Has the store the ~~XIth~~ 13th revision of the United States Pharmacopoeia? Yes Give serial number: ~~60000~~ 33489

9. Has the store the ~~XIth~~ 13th edition of the National Formulary? Yes Give serial number: ~~80000~~ 30993

10. Does store keep a Poison Register (yes or no) Yes

11. Does store keep a Record of Sales of Exempt Narcotics? (yes or no) Yes

(Fill in Other Side)

4

It is hereby certified, under oath, that the store has all the apparatus listed below:

Suitable prescription files

Suitable refrigeration (if biological are stocked)

One Poison cabinet (for more dangerous drugs)

One Poison Register

One Narcotic Drug Cabinet

One exempt narcotic register

One prescription scale, sensitive to ½ grain

One dispensing scale, for large quantities

One set apothecary weights from ½ grain to 1 ounce

One set avoirdupois weights from ½ ounce to 2 pounds

One set metric weights from 10 mg. to 50 gm.

(Enter number before each of the following)

(Requires number is indicated in parenthesis)

2 Stirring rods, glass or rubber (2) #2510

3 Test tubes (assorted sizes) (3) 5 x 5/8"

1 Pill tile, 10x12, glass or porcelain (1) #3190

1 Evaporating dishes or casseroles, (porcelain or other suitable material) (1)

1 Apparatus for heating above

1 Glass percolator (any convenient size) (1)

1 Sieve (moderately fine) (1)

A reasonable amount of filter paper, litmus paper, powder papers, empty capsules, corks, ointment jars, bottles, pill and powder boxes, labels and distilled water.

Graduate, glass Apothecary (Set No. 1), at least eight
(Fill in number after each size listed)

30 min.		2 oz.	1 - #60345
60 min.	1 - #6033	4 oz.	1 - #60345
¼ oz.	1 - #60345	8 oz.	1 - #60345
½ oz.	1 - #60345	16 oz.	1 - #60345
1 oz.	1 - #60345	32 oz.	

Graduates, glass Metric (Set No. 1), at least eight
(Fill in number after each size listed)

5 cc.		60 cc.	
10 cc.		125 cc.	
15 cc.		250 cc.	
30 cc.		500 cc.	
1000 cc.			

(One set with metric and apothecary graduations will suffice)

Mortars and Pestles, (glass), at least two
(Fill in size and number)

4 oz. glass #3100M	oz. glass or porcelain
8 oz. glass #3100M	oz. glass or porcelain
oz. glass or porcelain	oz. glass or porcelain

Mortars and Pestles, Wedgewood, at least three

1-16 oz. Wedgewood #3100P	oz. Wedgewood
1-5½ oz. Wedgewood #3100P	oz. Wedgewood
1-4 oz. Wedgewood #3100P	oz. Wedgewood

Spatulas, steel, at least three assorted sizes
(Fill in size and number)

4 in. steel, No. 3451 (1)	in. steel, No.
6 in. steel, No. 3451 (1)	in. steel, No.
8 in. steel, No. 3451 (1)	in. steel, No.

Rubber or non-metalic, (assorted sizes), at least two

6 in., No. 3452 (1)	in., No.
4 in., No. 3452 (1)	in., No.

Funnels, glass, at least three assorted sizes
(Fill in size and number)

2 oz., No. 2260 (1)	oz., No.
8 oz., No. 2260 (1)	oz., No.
16 oz., No. 2260 (1)	oz., No.

12. And that proper sanitary conditions are maintained. The store is equipped with proper sanitary appliances, a detail of which follows:

(a) Plumbing (sanitary) Yes
(b) Towels Yes
(c) Running water Yes
(d) Lighting, etc. Yes

14. Signed: SNYDER'S DRUG STORES, INC.

Applicant: by Lloyd D. Berkus President

Address 1878 Hampshire Avenue, St. Paul, Minnesota

15. Subscribed and sworn to before me this 25th day of January, 19 71

Notary Public

Please Answer All Questions Carefully and Accurately

(All Licenses Expire July 1st. Your Application for Renewal Must Be Filed Before June 30th)

AFFIDAVIT

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

Lloyd D. Berkus (hereinafter called "Berkus") and Richard C. Johnson (hereinafter called "Johnson"), being duly sworn on oath, depose and say that:

1. This affidavit is given in support of, and to furnish additional information in connection with, an Application for Permit to operate a pharmacy or drugstore in the area outlined in red on EXHIBIT A to the sublease annexed hereto as EXHIBIT I and hereby made a part hereof (hereinafter called the "Pharmacy Area"), which is located in the premises commonly known and referred to as 715 East Broadway, City of Bismarck, County of Burleigh, State of North Dakota (hereinafter called the "Red Owl Store").

2. Berkus is the duly elected, acting and qualified President of Snyder's Drug Stores, Inc., a Minnesota corporation (hereinafter called "Snyders"). Johnson is the duly elected, acting and qualified Vice President and Secretary of Red Owl Stores, Inc., a Delaware corporation (hereinafter called "Red Owl"), and Secretary of Snyders.

3. Snyders is qualified and authorized to transact business in the State of North Dakota.

4. The names, addresses and principal officers of Snyders are as follows:

Lloyd D. Berkus
1878 Hampshire
St. Paul, Minn. 55116
President

Lou Sachs
1700 West 26th Street
Minneapolis, Minn.
Sr. Vice President

William H. Smith
6116 Chowen Avenue
Minneapolis, Minn. 55410
Vice President

Leroy Kieffer
612 South Brimhall
St. Paul, Minn. 55106
Vice President

Joel Raffenbeul
242 - 13th Avenue S.
Hopkins, Minn. 55343
Vice President

Richard C. Johnson
5400 West 70th Street
Edina, Minn. 55435
Secretary

Sheldon V. Durtsche
2905 - 32½ Avenue N.E.
Minneapolis, Minn. 55418
Asst. Secretary

William C. Ferril
17225 - 24th Avenue N.
Wayzata, Minn. 55391
Treasurer

Orville G. McDonald
5808 Halifax Avenue S.
Edina, Minn. 55424
Asst. Treasurer

5. The names and addresses of the directors of Snyders are as follows:

Lloyd D. Berkus—1878 Hampshire, St. Paul, Minn. 55116

James H. Wille—Route 4, Box 56A, Excelsior, Minn. 55331

James E. Gottlieb—1654 Pinehurst, St. Paul, Minn. 55116

6. Irwin Livon, a pharmacist registered and in good standing in the State of Minnesota, is director of professional services for Snyders and is responsible for the purchase of all pharmaceuticals and the field supervision and maintenance of professional standards in all Snyders drugstores and pharmacy departments.

7. Kenneth Swanson, currently residing at 72 Knollwood Court, Faribault, Minnesota 55201, a pharmacist registered and in good standing in the States of Minnesota and North Dakota, is currently employed by Snyders and, upon issuance of a permit to operate a pharmacy in the Pharmacy Area, will be actively and regularly employed in and responsible for the management, supervision and operation of such pharmacy.

8. Snyders and its predecessor in interest owned and operated drugstores and pharmacies in the State of Minnesota since 1931.

9. Snyders currently operates 37 drugstores, seven pharmacy departments in other stores and has franchise agreements for the operation of five other drugstores and pharmacy departments in the States of Iowa, Michigan, Minnesota, South Dakota and Wisconsin.

10. Snyders currently employs 120 pharmacists, all of whom are registered and in good standing in the states in which they are employed.

11. Snyders is in compliance with all applicable pharmacy laws and regulations in all states in which it operates.

12. Snyders has 5,000 shares of common stock authorized and outstanding, all of which are owned by Red Owl. Snyders has no other class of stock authorized or outstanding.

13. As of January 31, 1970, there were 2,222 shareholders of Red Owl. It is not known whether any such shareholders are or were pharmacists registered and in good standing in the State of North Dakota.

14. The sublease between Red Owl and Family Center Drug Stores, Inc., a North Dakota corporation (hereinafter called "Family Center Drug"), dated June 14, 1968, as amended August 18, 1969, relating to the Pharmacy Area has been terminated and cancelled and Family Center Drug no longer has any rights thereunder.

15. The Snyder Franchise Agreement between Snyders and Family Center Drug dated June 14, 1968, relating to the Pharmacy Area has been terminated and cancelled, and Family Center Drug no longer has any rights thereunder.

16. Snyders will occupy the Pharmacy Area pursuant to the sublease annexed hereto as EXHIBIT I.

17. The floor plan of the Red Owl Store is annexed hereto as EXHIBIT II and hereby made a part hereof.

18. The Pharmacy Area will be secured from the rest of the Red Owl Store in accordance with the plan annexed hereto as EXHIBIT III and hereby made a part hereof.

19. Each pharmacist designated in paragraph 6 of the Application for Permit will have a key to the Red Owl Store.

20. No one other than said pharmacists will have a key to the Pharmacy Area.

/s/ Lloyd D. Berkus
/s/ Richard C. Johnson

Subscribed and sworn to before me this 25th day of January, 1971.

/s/ Aimee M. Murphy
Notary Public
My Commission Expires Feb. 20, 1975.

NOTE: Sublease, Exhibit I, and Diagram, Exhibit A, which were attached to the Application have been omitted from this appendix but are part of the record.

INVESTIGATION REPORT

Re: Snyder Drug Store Application

STATE OF NORTH DAKOTA)
) SS:
COUNTY OF BURLEIGH)

Al Doerr, being first duly sworn, deposes and says as follows:

1. That he is the Secretary of the North Dakota State Board of Pharmacy; and makes this affidavit as an investigation report in such capacity, regarding the application of Snyder Drug Stores, Inc., for a pharmacy permit.

2. That he has personally inspected the proposed location of the Snyder Drug Store, such being given as 715 East Broadway Avenue, Bismarck, North Dakota; and found such address to be a large Red Owl food and general merchandise store.

3. That within said store he found a wall of the store containing a large sign indicating "Drugs," which he believes to be a violation of State law.

4. Near the "Drug" sign, he found an area apparently intended to be used as a drug area with an open entry, doorway, and two large (25-35 feet long) windows covered with a blue cloth curtain.

5. That the only observable restroom near the drug area was a restroom in the corner of the building, apparently used by all customers of the store, including the restaurant, which restroom was locked and had a sign on the door, indicating that the key could be found in the cosmetics department.

6. That from my observation, it appeared that the "drug store" would not have its own receiving and storage area, but would have a receiving and storage area in common with the groceries and general merchandise departments.

7. That the location of the drug store was within the supermarket without a separate entrance or exit.

8. That from examination of the premises, it could not be determined that physical safeguards, if any, were planned for the protection of the public from dangerous or narcotic drugs.

9. That during the inspection, affiant noticed certain drug products already being sold by Red Owl, including Bromo-Selzer, Cope, Bufferin, Sominex, Anacin, No-Doz, Excederin, and Snyder's Extra Strength Pain Reliever.

10. That the application submitted by Snyder Drug Stores, Inc., and supporting material, indicates that all of the common stock of Snyder Drug Stores, Inc., is owned by Red Owl Stores, a corporation; and that Red Owl has

2,222 shareholders; and that it is unknown if any of the 2,222 shareholders are registered pharmacists in North Dakota.

11. That affiant has presented this information to the Board of Pharmacy for their consideration of the application of Snyder Drug Store, Inc., for a pharmacy permit.

Dated this 22nd day of March, 1971.

/s/ Al Doerr

Subscribed and sworn to before me this 22nd day of March, 1971.

/s/ A. William Lucas
Notary Public
Burleigh County,
North Dakota

My commission expires 6/24/71

EXCERPT FROM PROCEEDINGS, NORTH DAKOTA STATE BOARD OF PHARMACY, MONDAY, MARCH 22, 1971

It was moved by Mrs. Elizabeth Getz that the application of Snyder's Drug Stores, Inc., for a permit to operate a pharmacy at 715 East Broadway in the City of Bismarck, North Dakota, be denied on the grounds and for the reasons that the application on its face shows a non-compliance with the requirements of the North Dakota Century Code, relating to ownership and control of a corporate applicant; and, further, that the proposed site and location thereof are defective, in that there is no provision for an adequate storage or receiving area separate from those used by other businesses operated within the structure; that the provision of washrooms and restrooms

is inadequate, in that investigation shows the same are kept locked, and not available to the general public; that the proposed location of the facility within a supermarket complex, with no separate entrance or exit for access to the pharmacy as a separate entity, does not provide a sufficient safeguard for the integrity and protection of the dangerous or narcotic compounds located therein; and, further, that based upon the recent North Dakota Supreme Court decision in Family Center Drug Stores, Inc., vs. the North Dakota State Board of Pharmacy, the application does not conform to statutory requirements, and must be denied.

This motion was seconded by Jim Irgens, and was unanimously adopted by the members of the board.

ADMINISTRATIVE FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

APPLICATION FOR PERMIT TO OPERATE A PHARMACY OR DRUG STORE AT 715 EAST BROADWAY IN THE CITY OF BISMARCK, NORTH DAKOTA, BY SNYDER DRUG STORES, INC.

The application by Snyder Drug Stores, Inc., for a permit to operate a pharmacy or drug store at 715 East Broadway in the City of Bismarck, North Dakota, having been presented to the State Board of Pharmacy on the 22nd day of March, 1971, and the Secretary of the State Board of Pharmacy having made an investigation of said application; and the board, after examining the investigation report, the application and supporting material, and other material submitted to the board; and the board being fully advised in the premises, it now makes the following findings of fact, conclusions of law, and order:

FINDINGS OF FACT

1.

That the proposed location of the Snyder Drug Store will be at 715 East Broadway Avenue, Bismarck, North Dakota; and will be within the large Red Owl food and general merchandise store; and that the drug store will not have a separate entrance or exit, but will use the entrances and exits provided for the Red Owl food and general merchandise store.

2.

That the area within the supermarket apparently intended to be used as a drug store is an area with an open entry doorway, and with two large windows covered with a blue cloth curtain.

3.

That the drug store area will not have its own receiving and storage area, but will share a receiving and storage area with the grocery and general merchandise departments of the Red Owl supermarket store.

4.

That the only observable restroom near the drug area was a restroom in the corner of the building, apparently used by all customers of the store, including the restaurant; and that said restroom is locked and had a sign on the door indicating that the key could be found in the cosmetic department.

5.

That within the Red Owl food store, there is presently a large sign on the wall, indicating "Drugs," and that the Red Owl store is presently selling certain drug products.

6.

That Snyder Drug Stores, Inc., is a Minnesota corporation; and that all of the common stock of Snyder Drug Stores, Inc., is owned by Red Owl Stores, Inc., a Delaware corporation; and that Red Owl Stores, Inc., has 2,222 shareholders; and that the applicant does not know if any of the 2,222 shareholders are registered pharmacists in the State of North Dakota.

CONCLUSIONS OF LAW

From the foregoing findings of fact, the board makes the following conclusions of law:

1.

That the corporate applicant Snyder Drug Stores, Inc., has failed to comply with subsection 5 of Section 43-15-35, N.D.C.C., which provides that if the applicant is a corporation, that the majority of the stock must be owned by a registered pharmacist in good standing, actively and regularly employed in and responsible for the management, supervision, and operation of the pharmacy.

2.

That the present store located at 715 East Broadway Avenue, Bismarck, North Dakota, is in violation of State law by having a "Drug" sign prominently displayed on a wall within the store; and that they are selling a large number of drug items at the present time.

3.

That the drug store proposed by the applicant does not have the necessary and required physical safeguards for the protection of the public from dangerous and narcotic drugs; does not have adequate restroom facilities;

does not have an adequate receiving and storage area for the protection of the public, as required by the rules and regulations of the State Board of Pharmacy.

From the findings of fact and conclusions of law set forth herein, the State Board of Pharmacy of the State of North Dakota does conclude that the pharmacy or drug store of which a permit has been requested by Snyder Drug Stores, Inc., will not be conducted in full compliance with existing laws, and with the rules and regulations established by the board; and does not comply with Section 43-15-35, subsection 5, of the North Dakota Century Code, as amended, now, therefore:

It is hereby ORDERED that the application of Snyder Drug Stores, Inc., be, and it is hereby, denied.

Dated this 22nd day of March, 1971.

North Dakota State Board of Pharmacy
By /s/ Al Doerr
Its Secretary

NOTICE OF APPEAL

TO THE NORTH DAKOTA STATE BOARD OF PHARMACY AND CONMY, CONMY, ROSENBERG, LUCAS AND OLSON, ITS ATTORNEYS; AND TO HELGI JOHANNESON, NORTH DAKOTA ATTORNEY GENERAL, RESPONDENTS:

YOU WILL PLEASE TAKE NOTICE that the appellant in the above entitled action in accordance with Section 43-15-41 of the North Dakota Century Code hereby appeals to the District Court of Burleigh County, North Dakota, from that certain order of the North Dakota State Board of Pharmacy dated March 22, 1971, denying the appellant's Application for Permit dated January 25, 1971,

to operate a pharmacy or drugstore in Bismarck, North Dakota. A copy of the Order is attached hereto, marked as Exhibit "A" and made a part hereof.

YOU WILL ALSO TAKE NOTICE That hereto attached are the appellant's Specifications of Errors.

Dated this 12th day of April, 1971.

Snyder's Drug Stores, Inc.
By /s/ Mart R. Vogel
One of Its Attorneys

EXHIBIT "A"

Excerpt from Proceedings, North Dakota State Board of Pharmacy, Monday, March 22, 1971. Was previously printed earlier in this appendix, see p. 11.

SPECIFICATIONS OF ERRORS

The petitioner's appeal from the decision of the North Dakota State Board of Pharmacy denying its application for a permit to operate a pharmacy in the City of Bismarck, North Dakota, is based upon the following grounds:

I.

Section 43-15-35(5) of the North Dakota Century Code, on which the Board of Pharmacy relied in denying the petitioner's application for a pharmacy permit, is unconstitutional in that it violates the Constitution of the United States in the following respects, among others:

1. The statute violates Amendment 14, Section 1 of the United States Constitution which states that no State shall deny to any person within its jurisdiction the equal protection of the laws.

2. The statute violates Amendment 14, Section 1, of the United States Constitution which states that no person shall deprive any person of his liberty or property without due process of law.

II.

Section 43-15-35(5) of the North Dakota Century Code is unconstitutional in that it violates the provision of the Constitution of the State of North Dakota in the following respects, among others:

1. The statute violates Section 11 of the North Dakota Constitution, which provides that all laws of a general nature shall have uniform operation.

2. The statute violates Section 20 of the North Dakota Constitution which states that no citizen or class of citizens shall be granted privileges or immunities which shall not be granted to all citizens upon the same terms.

III.

The finding of the State Board of Pharmacy that the proposed site and location are defective in that there is no provision for an adequate storage or receiving area separate from those used by other businesses operated within the structure is not supported by the evidence and is not in accordance with law.

IV.

The finding of the State Board of Pharmacy that the provision for washroom and rest rooms is inadequate in that the same are kept locked and are not available to the general public is not supported by the evidence and is not in accordance with law.

V.

The finding of the State Board of Pharmacy that the proposed location of the facility within a supermarket complex does not provide a sufficient safeguard for the integrity and protection of dangerous or narcotic drug compounds located therein is not supported by the evidence and is not in accordance with the law.

Dated this 12th day of April, 1971.

Snyder's Drug Stores, Inc.
By /s/ Mart R. Vogel
One of Its Attorneys

(Undertaking on Appeal Omitted.)

CERTIFICATION OF RECORD ON APPEAL

Comes now Al Doerr, as Secretary of the North Dakota State Board of Pharmacy; and hereby certifies to the District Court of Burleigh County, North Dakota, that the following documents as listed hereon and attached hereto constitute the record on appeal of the above captioned matter; and that such comprise the entire file of the North Dakota State Board of Pharmacy, with the exception of certain items of correspondence.

That a listing of such record is as follows:

1. Application for pharmacy permit by Snyder's Drug Stores, Inc., dated January 25, 1971.
2. Affidavit of Lloyd D. Berkus and Richard C. Johnson, and Exhibits I, A, II, and III in support thereof.
3. Investigation report by Al Doerr, dated March 22, 1971.
4. Excerpt of Proceedings of North Dakota State Board of Pharmacy, Monday, March 22, 1971.

5. Administrative Findings of Fact, Conclusions of Law, and Order, dated March 22, 1971.

Dated this 11th day of May, 1971.

/s/ Al Doerr

Subscribed and sworn to before me this 11th day of May, 1971.

/s/ A. William Lucas
Notary Public
Burleigh County, North Dakota

My commission expires 6-24-71

Conmy, Conmy, Rosenberg, Lucas & Olson
By /s/ A. William Lucas
Attorneys for Appellee
420 Fourth Street, Box 1398
Bismarck, North Dakota

MOTION FOR SUMMARY JUDGMENT

COMES NOW THE APPELLANT in the above entitled action and moves the Court for a summary judgment in favor of the appellant and against the respondent reversing the order of the North Dakota State Board of Pharmacy, in which the Board denied the appellant's application for a permit to operate a pharmacy or drugstore in Bismarck, North Dakota. This motion is made on the grounds that there is no genuine issue as to any material fact and that the appellant is entitled to a judgment as a matter of law.

If summary judgment is not rendered in appellant's favor upon the whole case or for all the relief asked and a hearing on the appeal is necessary, the appellant moves the Court, at the hearing on the motion, by examining the

pleadings and the evidence before it and by interrogating counsel, to ascertain what material facts are actually and in good faith controverted, and thereupon make an order specifying the facts that appear without substantial controversy and directing such further proceedings in the action as are just.

This motion is based upon:

(a) The files and record in this matter;

(b) The attached Affidavit of Lloyd D. Berkus;

(c) The Affidavit of C. Nicholas Vogel.

Dated this 16th day of November, 1971.

/s/ Mart R. Vogel
Of Wattam, Vogel, Vogel & Peterson
609½ First Avenue North
Fargo, North Dakota
Attorneys for Appellant

AFFIDAVIT

STATE OF MINNESOTA)
) ss
COUNTY OF HENNEPIN)

Lloyd D. Berkus, being first duly sworn, deposes and says:

I.

I am the duly elected, acting and qualified president of Snyder's Drug Stores, Inc., a Minnesota corporation, the above named Appellant. I have personal knowledge of the matters hereinafter referred to, and make this affidavit in support of Appellant's motion for summary judgment.

II.

The area for the proposed pharmacy in the Red Owl Family Center in Bismarck, North Dakota, will be shut off and segregated from the main store by folding doors which will be secured and locked whenever a pharmacist is not present. Narcotic drugs will be kept in the narcotic drugs cabinet, which will be locked when a pharmacist is not present. The public will not have access to any dangerous, narcotic or prescription drugs except through a pharmacist who will be present at all times when the area is opened to the public.

III.

Bathroom facilities for men and for women will be immediately adjacent to the planned drug area and will be available to customers if a permit is granted.

IV.

The planned pharmacy facilities in the Red Owl Family Center to be operated by Snyder's Drug Stores, Inc., are identical to the facilities which Family Center Drug Store planned to operate in the same store until its application for a permit was denied by the State Board of Pharmacy in 1969. The application was rejected by the Board of Pharmacy on the grounds, among others, that the restroom facilities, the storage and receiving areas and the provisions for protecting the public from narcotic drugs were inadequate. In an appeal from the Board's order denying the application, Judge Fredricks of the Burleigh County District Court specifically found that there was no evidence supporting the Board's findings in these areas. A copy of the Court's Findings of Fact, Conclusions of Law and Order is attached to this affidavit and marked as Exhibit "I".

Dated this 15 day of September, 1971.

/s/ Lloyd D. Berkus

Subscribed and sworn to before me this 15th day of September, 1971.

/s/ Aimee M. Murphy
Notary Public
Hennepin County, Minnesota

(Seal)

My commission expires: Feb. 20, 1975.

AFFIDAVIT

C. Nicholas Vogel, being first duly sworn, deposes and says:

I.

I am 28 years old and a lifelong resident of North Dakota. I have personal knowledge of the matters hereinafter referred to, and make this affidavit in support of the plaintiff's motion for summary judgment.

II.

I have shopped many times at the K-Mart store located on the south side of Fargo, North Dakota, and have purchased there such packaged medicines as Dristan, Chloroseptic, and Bayer Aspirin. In addition, I know the store has available for sale such packaged medicines as Excedrin, Anacin, Bromo-Selzer, Bufferin, Sominex, and No-Doz. I have never seen a pharmacist in or near the area where the medicines are sold, and it does not appear to be under the management or control of a pharmacist. Likewise, the K-Mart store at Grand Forks, North Dakota, has the same or similar medicines for sale at public counters.

III.

I have also shopped many times at the downtown drugstores in Fargo, including the Broadway Pharmacy and White Drug. Both of these drugstores sell numerous non-medical goods, including magazines, toothpaste, gifts, small appliances and cosmetics. In both stores many packaged medicines are displayed for sale on shelves directly accessible by the public. The drug areas in both stores are located toward the rear of the stores, and in both there is a raised counter behind which the pharmacist usually works, the bulk and prescription drugs are kept and the prescriptions themselves are compounded. In the Broadway Pharmacy, access to the area behind the counter can be obtained by going through an open doorway south of the raised counter. At the White Drug, there is a low swinging door at the south end of the raised counter which gives access to the restricted area.

Dated this 22d day of September, 1971.

/s/ C. Nicholas Vogel

Subscribed and sworn to before me this 22d day of September, 1971.

/s/ Carol Reinpold
Notary Public
Cass County, North Dakota

My commission expires: 12-6-76.

RETURN TO MOTION FOR SUMMARY JUDGMENT

Comes now the appellee, North Dakota State Board of Pharmacy, and hereby resists the motion for summary judgment of the appellant, Snyder's Drug Stores, Inc., and hereby submits the following as its return to the

motion for summary judgment and memorandum concerning the facts and law involved.

The principal issue between the parties on this appeal according to the appellant is the constitutionality of Section 45-15-35 (5) of the North Dakota Century Code. This involves the question of whether there is a substantial relation between majority ownership by licensed pharmacist of a drug store and the public interest, health, and welfare.

NOTE: The remainder of the Return to Motion included argument and brief material which is omitted from this appendix but is a part of the record.

Respectfully submitted,

Conmy, Conmy, Rosenberg, Lucas & Olson
Attorneys for Appellee
420 North Fourth Street
P. O. Box 1398
Bismarck, North Dakota 58501
By /s/ A. William Lucas

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER FOR JUDGMENT

This is an appeal from an order of the North Dakota State Board of Pharmacy dated March 22, 1971, denying the appellant's Application for a Permit dated January 25, 1971, to operate a pharmacy or drugstore in Bismarck, North Dakota. Appellant served and filed a notice of appeal dated April 12, 1971, with specification of errors and undertaking on appeal to the District Court of the State of North Dakota. Thereafter, on November 16, 1971, the appellant moved for summary judgment. Attached to the motion were affidavits of Lloyd D. Berkus and

C. Nicholas Vogel, as well as the appellant's brief in support of motion for summary judgment. On December 3, 1971, the respondent served its return to the appellant's motion and on that same date the case was argued to the District Court.

After examining the pleadings, affidavits, records and files in the case, and having studied the proofs and briefs and considered the arguments of counsel and being fully advised in the premises, the Court now makes the following findings of fact, conclusions of law and order for judgment:

FINDINGS OF FACT

I.

The appellant is a Minnesota corporation qualified and authorized to transact business in the State of North Dakota. The corporation has 5,000 shares of common stock authorized and outstanding, and all of these shares are owned by Red Owl Stores, Inc., a Delaware corporation.

I.

As of January 31, 1970, there were 2,222 shareholders of Red Owl. A majority of the Red Owl stock is not owned by registered pharmacists.

III.

On January 25, 1971, Snyder's Drug Stores, Inc., applied for a permit to operate a pharmacy in the Red Owl Family Center in Bismarck, North Dakota.

IV.

The appellant's application and attached affidavits established that Kenneth Swanson, a pharmacist registered

and in good standing in the State of North Dakota, would be actively and regularly employed in and responsible for the management, supervision and the operation of the pharmacy once the permit was granted.

V.

The appellant's application, the blueprints for the planned pharmacy and the uncontested affidavits attached to the application and to the appellant's motion for summary judgment establish that the planned pharmacy area will include folding doors which will shut off the drug area within the Family Center store whenever a registered pharmacist is not present. Access to the planned area by the public will be available only when there is a registered pharmacist in attendance, and only registered pharmacists will have a key giving them access to the pharmacy area. The planned facility will have a narcotic drug cabinet which will be locked whenever a pharmacist is not present.

VI.

The plaintiff's application for a permit, the blueprints for the planned pharmacy area and the affidavits attached to the application and to the motion for summary judgment establish that bathroom facilities for both men and women are available just a few feet east of the planned drug area, that proper plumbing, running water, towels and lighting will be provided in the planned area and that the toilet facilities will be made readily available to pharmacy customers if the permit is granted.

VII.

The appellant's application for a permit and the attached blueprints establish that there will be a receiving area immediately behind the pharmacy area which will

be accessible from the outside of the store and that there will be storage facilities both in the restricted drug area and immediately adjacent to the restricted area.

VIII.

The appellant's application for a permit establishes that if a permit is granted, the pharmacy will be conducted in full compliance with the North Dakota Century Code, with existing laws, and with the valid regulations of the Board of Pharmacy.

IX.

The plaintiff's application for a permit was denied by The North Dakota Board of Pharmacy on March 22, 1971. On April 12, 1971, within the allowed 30 day period, the appellant filed its notice of appeal.

X.

At the present time there is available for sale in the Red Owl Family Center various packaged drug remedies available without prescription such as Bufferin, Sominex, Anacin, Excedrin and Bromo Seltzer. Widely advertised packaged medicines like these are being sold in large supermarkets throughout the State of North Dakota, including the K-Mart stores in Fargo and Grand Forks, without a registered pharmacist being present.

XI.

The drug stores presently operating in the State of North Dakota, including the Broadway Pharmacy and White Drug Store in Fargo, North Dakota, sell numerous non-medical goods. Many packaged medicines are displayed for sale on shelves directly accessible to the public. The drug areas of both stores are located behind raised counter areas at one end of the store and access to these

areas is accessible through doorways which are open when pharmacists are present in the area.

XII.

The planned pharmacy facilities in the Red Owl Family Center to be operated by the appellant are identical to the facilities which Family Center Drug Store planned to operate in the same store until its application for a permit was denied by the State Board of Pharmacy in 1969. Among the reasons cited for the denial of this earlier application was the assertion that the restroom facilities, storage and receiving areas and the provisions for protecting the public from narcotic drugs were inadequate. These findings were appealed to the Burleigh County District Court and the Court found that there was no evidence supporting the Board's findings in these areas.

XIII.

The board of Pharmacy has not issued any regulations specifying the standards for storage in receiving areas in planned pharmacies and the published rules and regulations of the Board of Pharmacy do not at present require pharmacies to provide open toilet facilities to the public.

XIV.

The applicant did not comply with subsection 5 of Section 43-15-35 of the North Dakota Century Code requiring that a majority of the stock of corporate applicants be owned by registered pharmacists in good standing, actively and regularly employed in and responsible for the management, supervision and operation of the proposed pharmacy.

From the foregoing findings of fact, the Court now makes his conclusions of law:

CONCLUSIONS OF LAW

I.

The Court has jurisdiction of the parties and the subject matter in this action.

II.

There is no genuine issue of material fact actually and in good faith controverted by the parties.

III.

The finding of the State Board of Pharmacy that the proposed site and location of the planned pharmacy are defective because of alleged inadequate storage and receiving areas is not supported by the evidence and is not in accordance with law.

IV.

The finding of the State Board of Pharmacy that the provisions in the planned pharmacy for washroom and restroom facilities are inadequate is not supported by the evidence and is not in accordance with law.

V.

The finding of the State Board of Pharmacy that the provisions for the planned pharmacy do not include necessary and required physical safeguards for the protection of the public from dangerous and narcotic drugs is not supported by the evidence and is not in accordance with law.

VI.

The finding and conclusion of the State Board of Pharmacy that Red Owl Stores, Inc., is in violation of State law by having a drug sign permanently displayed within

the present Family Center store is not relevant to the present action since the present applicant for a permit is Snyder Drug Stores, Inc., and not Red Owl Stores, Inc.

VII.

The medicines currently being sold in the existing Red Owl Store are proprietary medicines exempted from control by the State Board of Pharmacy by Section 43-15-02 of the North Dakota Century Code.

VIII.

The State Board of Pharmacy is collaterally estopped from questioning the adequacy of the provisions for narcotic drugs and for washroom facilities since these issues were determined adversely to the Board in earlier litigation between the Board and the Family Center Drug Store, Inc., and since the issues and evidence in this earlier litigation were identical to the issues and evidence in the present litigation.

IX.

The requirement that a majority of the stock of a corporate applicant for a permit to operate a pharmacy in the state of North Dakota be owned by registered pharmacists in good standing in North Dakota is not a reasonable requirement; it does not bear a definite relation to the public health, safety, and welfare and is not expedient and necessary for the protection of public health, public safety, public morals or public welfare. The requirement has no real, substantial relation to public objects which the government may legally accomplish, since it adds nothing to the legitimate regulation of drugs, pharmacists and pharmacies in the state of North Dakota, all of which are already closely and directly regulated by various federal and state statutes and agencies.

X.

The exemption from the requirements of subsection 5 of Section 43-15-35 of the North Dakota Century Code of all those who held pharmacy permits on July 1, 1963, and all hospital pharmacies creates a classification which is not reasonably necessary to effect the purpose of the law. The effect of the exemption is to create a privileged class and to grant to that class an immunity which has not been granted on the same terms to all citizens of the state.

XI.

Section 43-15-35(5) of the North Dakota Century Code is unconstitutional in that it violates Amendment 14, Section 1 of the United States Constitution, prohibiting a state from denying to any person within its jurisdiction the equal protection of the law and from depriving any person of his liberty or property without due process of law.

XII.

Section 43-15-35(5) of the North Dakota Century Code is unconstitutional in that it violates both Section 11 of the North Dakota Constitution, which states that all laws of a general nature shall have uniform operation, and Section 20 of the North Dakota Constitution, which states that no citizen or class of citizens shall be granted privileges or immunities which shall not be granted to all citizens upon the same terms.

XIII.

The appellant is entitled to have issued to it by the respondent a permit to operate pharmacy in the Red Owl Family Center in Bismarck, North Dakota.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated this 30th day of December, 1971.

By the Court:

/s/ M. C. Fredricks

SUMMARY JUDGMENT

The motion of the appellant, Snyder's Drug Stores, Inc., for a summary judgment pursuant to Rule 56 of the North Dakota Rules of Civil Procedure having been presented and the Court, being fully advised, having found that the appellant, Snyder's Drug Stores, Inc., was entitled to a summary judgment as a matter of law, NOW, THEREFORE

IT IS ORDERED, ADJUDGED AND DECREED:

I.

That the motion of the appellant Snyder's Drug Stores, Inc., for summary judgment against the respondent North Dakota State Board of Pharmacy be and the same is hereby granted.

II.

That the respondent issue to the appellant a permit to operate pharmacy in the Red Owl Family Center in Bismarck, North Dakota.

Witness the Honorable M. C. Fredricks, Judge of the District Court, and my hand and seal of this Court the 6th day of January, 1972.

/s/ Thora Dennis

Clerk of District Court

NOTICE OF APPEAL

TO: Snyder's Drug Stores, Inc., Wattham, Vogel, Vogel and Peterson, Attorneys for Snyder's Drug Stores, Inc., and the Clerk of the District Court:

PLEASE TAKE NOTICE that the above named appellee/appellant North Dakota State Board of Pharmacy hereby appeals to the Supreme Court of the State of North Dakota, from the summary judgment rendered and entered in said action on the 6th day of January, 1972, in favor of the appellant/respondent Snyder's Drug Stores, Inc. and against the appellee/appellant North Dakota State Board of Pharmacy and that said appeal is taken from the whole thereof.

YOU WILL ALSO TAKE NOTICE that hereto attached are the appellee/appellant's Specifications of Error.

Dated at Bismarck, North Dakota, this 4th day of April, 1972.

Conmy, Conmy, Rosenberg, Lucas & Olson
Attorneys for the Appellee/Appellant
North Dakota State Board of Pharmacy
207 MDU Office Building,
P. O. Box 1398
Bismarck, North Dakota 58501

By /s/ A. William Lucas
A Member of said Firm

(Undertaking on Appeal Omitted.)

SPECIFICATIONS OF ERROR

Comes now the appellee/appellant in the above entitled matter and alleges the following as specifications of error on appeal to the Supreme Court of the State of North Dakota:

1.

That the Court erred in holding that the requirement of Subsection 5 of Section 43-15-35 of the North Dakota Century Code providing that a majority of the stock of a corporate applicant for a permit to operate a pharmacy in the State of North Dakota be owned by a registered pharmacist in good standing in North Dakota is not a reasonable requirement or that it is unconstitutional; that it does not bear a definite relation to the public health, safety, and welfare and is not expedient and necessary for the protection of public health, public safety, public morals or public welfare. The Court erred in holding that the requirement has no real, substantial relation to public objects which the government may legally accomplish, since it adds nothing to the legitimate regulations of drugs, pharmacists and pharmacies in the State of North Dakota.

2.

That the Court erred in holding that Section 43-15-35(5) of the North Dakota Century Code is unconstitutional in that it violates Amendment 14, Section 1 of the United States Constitution, prohibiting a state from denying to any person within its jurisdiction the equal protection of the law and from depriving any person of his liberty or property without due process of law.

3.

The Court erred in holding that Section 43-15-35(5) of the North Dakota Century Code is unconstitutional in that it violates both Section 11 of the North Dakota Constitution, which states that all laws of a general nature shall have uniform operation, and Section 20 of the North Dakota Constitution, which states that no citizen or class of citizens shall be granted privileges or immunities which shall not be granted to all citizens upon the same terms.

4.

That the Court erred in holding that the exemption from the requirements of Subsection 5 of Section 43-15-35 of the North Dakota Century Code of all those who held pharmacy permits on July 1, 1963, and all hospital pharmacies creates a classification which is not reasonably necessary to effect the purpose of the law.

5.

That the Court erred in holding that there was no genuine issue of fact before the Court on the motion for summary judgment heard by the Court resulting in the summary judgment herein appealed.

6.

That the Court erred in holding the following for the reason that said matters were questions of fact which were not properly before the Court on a motion for summary judgment and should not have been decided on a motion for summary judgment:

(a) That the finding of the State Board of Pharmacy that the proposed site and location of the planned pharmacy are defective because of alleged inadequate storage and receiving areas is not supported by the evidence and is not in accordance with law.

(b) That the finding of the State Board of Pharmacy that the provisions in the planned pharmacy for washroom and restroom facilities are inadequate is not supported by the evidence and is not in accordance with law.

(c) That the finding of the State Board of Pharmacy that the provisions for the planned pharmacy do not include necessary and required physical safeguards for the protection of the public from dangerous and narcotic drugs is not supported by the evidence and is not in accordance with law.

7.

That the Court erred in holding that the findings and conclusion of the State Board of Pharmacy that Red Owl Stores, Inc., is in violation of state law by having a drug sign permanently displayed within the present Family Center Store is not relevant to the present action since the present applicant for a permit is Snyder Drug Stores, Inc., and not Red Owl Stores, Inc.

8.

That the Court erred in holding that medicines currently being sold in the existing Red Owl Store are proprietary medicines exempted from control by the State Board of Pharmacy by Section 43-15-02 of the North Dakota Century Code.

9.

That the Court erred in holding that the State Board of Pharmacy is collaterally estopped from questioning the adequacy of the provisions for narcotic drugs and for washroom facilities since these issues were determined adversely to the Board in earlier litigation between the Board and the Family Center Drug Store, Inc.

10.

That the Court erred in holding that the appellant/respondent Snyder's Drug Stores, Inc. is entitled to have issued to it by the appellee/appellant a permit to operate a pharmacy in the Red Owl Family Center in Bismarck, North Dakota, after finding as a fact that the applicant did not comply with Subsection 5 of Section 43-15-35 of the North Dakota Century Code requiring that a majority of the stock of corporate applicants be owned by a registered pharmacist in good standing, actively and regularly employed in and responsible for the management, supervision and operation of the proposed pharmacy.

11.

That the Court erred in holding that the appellant/respondent Snyder's Drug Stores, Inc. is entitled to have issued to it by the appellee/appellant a permit to operate a pharmacy in the Red Owl Family Center in Bismarck, North Dakota.

Dated at Bismarck, North Dakota, this 4th day of April, 1972.

Conmy, Conmy, Rosenberg, Lucas & Olson
Attorneys for the Appellee/Appellant
North Dakota State Board of Pharmacy
207 MDU Office Building,
P. O. Box 1398
Bismarck, North Dakota 58501
By /s/ A. William Lucas
A Member of said Firm

NOTE: The opinion of the Supreme Court of North Dakota is reported at 202 N.W.2d 140, and is printed in the Petition for Writ of Certiorari on page 17.

ORDER FOR JUDGMENT ON REMITTITUR

WHEREAS, on the 6th day of January, 1972, summary judgment was entered in the above entitled action in favor of the appellant, and against the respondent, and

WHEREAS, the respondent perfected an appeal directly from said judgment to the Supreme Court of the State of North Dakota, and,

WHEREAS, by its decision the Supreme Court affirmed and in part reversed the summary judgment, holding that Section 43-15-35(5) of the North Dakota Century Code violates the due process clause of Section 1 of the Fourteenth Amendment to the United States Constitution, but also ruling that an administrative hearing on the appellant's application should be held pursuant to the Administrative Agencies' Practice Act,

NOW, THEREFORE, upon application of Wattam, Vogel, Vogel & Peterson, attorneys for the appellant, for a judgment in conformity with the mandate of the Supreme Court, it is hereby

ORDERED, ADJUDGED AND DECREED that Section 54-15-35(5) of the North Dakota Century Code is unconstitutional and of no force and effect, and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that within sixty days from the date hereof the pharmacy board conduct an administrative hearing on the appellant's application for a pharmacy permit to determine whether, apart from the ownership requirement, the appellant is qualified to receive a permit to operate a pharmacy under North Dakota law and the regulations of the North Dakota Board of Pharmacy, and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that neither party shall recover its costs and disbursements.

Dated this 29th day of December, 1972.

By the Court:

/s/ M. C Fredricks

JUDGMENT ON REMITTITUR

Judgment in favor of plaintiff in the amount of Judgment on Remittitur rendered on the 4th day of January, 1973, in District Court was entered in Judgment Book No. BBJ, page no. 244 in the office of the Clerk of District Court of Burleigh County at Bismarck, North Dakota on the 4th day of January, 1973.

/s/ Thora Dennis
Clerk of District Court

No. 72-11 W

In the Supreme Court of the United States

OCTOBER TERM, 1972

North Dakota State Board of Pharmacy,
Petitioner,

v.

Snyder's Drug Stores, Inc.,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of North Dakota

Frederick E. Saefke, Jr.
Counsel for Petitioner
411 North Fourth Street
Post Office Box 1874
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A. William Lucas
Conmy, Conmy, Robinson & Lucas
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February 20, 1973

INDEX

Appendix A (Continued)

TABLE OF CASES

STATUTE

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. _____

North Dakota State Board of Pharmacy,
Petitioner,

vs.

Snyder's Drug Stores, Inc.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

North Dakota State Board of Pharmacy, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the Supreme Court of North Dakota entered in the above-entitled case on October 31, 1972.

OPINIONS BELOW

The opinion of the Supreme Court of North Dakota is reported at 202 N.W.2d 140 and is printed in Appendix A hereto, infra, page 17 . The judgment on remittitur of the District Court of North Dakota is printed in Appendix A hereto, infra, page 36 .

The order denying the petition for rehearing is printed in Appendix A hereto, infra, page 34 .

JURISDICTION

The decision of the Supreme Court of North Dakota (Appendix A, infra, page 32) was entered on October 31, 1972. A timely petition for rehearing was denied on November 29, 1972 with notice thereof given to petitioner on December 4, 1972. (Appendix A, infra, page 38).

The jurisdiction of the Court is invoked under Title 28, United States Code Annotated, Section 1257.

QUESTIONS PRESENTED

Does Section 43-15-35(5), North Dakota Century Code, violate the due process clause of Section 1 of the Fourteenth Amendment of the United States Constitution?

STATUTE INVOLVED

Section 43-15-35(5) North Dakota Century Code:

"Requirements for permit to operate pharmacy.--The board shall issue a permit to operate a pharmacy, or a renewal permit, upon satisfactory proof that:

> " 5. The applicant for such permit is qualified to conduct the pharmacy, and is a registered pharmacist in good standing or is a partnership, each active member of which is a registered pharmacist in good standing, or a corporation or association, the majority stock in which is owned by registered pharmacists in good

standing, actively and regularly employed in and responsible for the management, supervision, and operation of such pharmacy; and

"The provision of subsection 5 of this section shall not apply to the holder of a permit on July 1, 1963, if otherwise qualified to conduct the pharmacy, provided that any such permit holder who shall discontinue operations under such permit or fail to renew such permit upon expiration shall not thereafter be exempt from the provisions of such subsection as to such discontinued or lapsed permit. The provisions of subsection 5 of this section shall not apply to hospital pharmacies furnishing service only to patients in such hospital."

STATEMENT

This was an appeal to the Supreme Court of North Dakota from a State District Court decision reversing an administrative agency decision of the North Dakota State Board of Pharmacy which denied a pharmacy permit to Snyder's Drug Stores, Inc. because it did not comply with the stock ownership require-

ments of Section 43-15-35(5) of the North Dakota Century Code.

The application for a pharmacy permit indicated that all of the common stock of Snyder's Drug Stores, Inc., was owned by Red Owl Stores and that it was not known if any shareholders of Red Owl Stores are or were pharmacists registered and in good standing in the State of North Dakota.

Section 43-15-35(5) of the North Dakota Century Code requires that the majority of the corporate stock of a corporate applicant for a pharmacy permit be owned by registered pharmacists in good standing, actively and regularly employed in and responsible for the management, supervision, and operation of the pharmacy.

The Supreme Court of North Dakota

held that it was bound by the decision of the United States Supreme Court in Liggett Co. v. Baldridge, 278 U.S. 105, 49 S.Ct. 57, 73 L.Ed. 204 (1928), and seeing insufficient basis for distinguishing that decision from the instant case, it sustained the trial court's conclusion that Section 43-15-35(5) of the North Dakota Century Code violates the due-process clause of Section 1 of the Fourteenth Amendment to the United States Constitution.

REASONS FOR GRANTING THIS WRIT

The 1928 Liggett v. Baldridge United Supreme Court case, which the North Dakota Supreme Court felt bound by, has been discounted, seriously limited, perhaps completely undermined, and not followed by courts in California, Maryland, Michi-

gan and by the United States Supreme Court itself.

The California case of Magan Medical Clinic v. California State Board of Medical Examiners, 57 Cal. Rptr. 256, at Page 263, stated that there can be no doubt that the rule (in Liggett v. Baldridge) is now different, quoting with approval from the Maryland case of Brooks v. State Board of Funeral Dir. & Embalm, 195 A.2d 728, 735 (1963) where it states "It (the Liggett case) has been seriously limited, if not completely undermined."

In the Maryland case of Brooks v. State Board of Funeral Dir. & Embalm, 195 A.2d 728 at Page 735 it states as follows:

> "The Liggett case has never been expressly overruled, but it has been seriously limited, if not completely undermined. See Daniel v. Family Security Life Ins. Co., 336 U.S. 220, 69 S.Ct. 550, 93 L.Ed. 632, in which

the Supreme Court sustained a state statute forbidding undertakers to serve as agents for life insurance companies. In commenting on Liggett, the United States Supreme Court said (336 U.S. at Page 224-225, 69 S.Ct. at Page 553, 93 L.Ed. 632): "We cannot say that South Carolina is not entitled to call the funeral insurance business an evil. Nor can we say that the statute has no relation to the elimination of those evils. There our inquiry must stop. This rationale did not find expression in Liggett Co. v. Baldridge, 278 U.S. 105, 49 S.Ct. 57, 73 L.Ed. 204, on which respondents rely. According to the majority in Liggett, "a state cannot" under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them." 278 U.S. at Page 113, 49 S.Ct. at Page 59, 73 L.Ed. 204. But a pronounced shift of emphasis since the Liggett case has deprived the words "unreasonable" and "arbitrary" of the content for which respondents contend. See Lincoln Federal Labor Union No. 19129, A. F. of L. v. Northwestern Iron and Metal Co., 335 U.S. 525, 69 S.Ct. 251, 93 L.Ed. 212; where the cases are reviewed."

The Brooks case at Page 735 also stated that "the sweep of the Liggett

case was already limited by the action of the Supreme Court in Markmann Funeral Home, Inc. v. Ryan, 300 U.S. 639, 57 S.Ct., 510, 81 L.Ed. 855.

It should be noted that the Supreme Court of Michigan, after many hearings and after extensive argument before their Supreme Court on three different occasions, in the case of Superx Drugs Corp. v. Michigan Board of Pharmacy reported at 146 N.W.2d 1, 134 N.W.2d 678, 132 N.W.2d 328, and 125 N.W.2d 13, has not by a majority decision of its Court, held a 25% ownership requirement by a registered pharmacist to be an unconstitutional requirement and they did not feel bound by the Liggett v. Baldridge case.

It is submitted that the North Dakota Supreme Court in the instant case, erred

in relying on Liggett v. Baldridge and in feeling that it was bound by this case in view of the criticism and conflicting interpretations of Liggett v. Baldridge by the courts in California, Maryland, Michigan, and by the United States Supreme Court in cases cited above.

As originally construed, the due process clause of the Fourteenth Amendment was viewed as a guaranty of procedural protection rather than bringing to the test of the decision of the United States Supreme Court the merits of the legislation. Davidson v. New Orleans, 97 U.S. 97, 103, 104 (1878).

Later the Court departed from this emphasis on the procedural aspect and considered the law itself. This attitude of the Court found expression in many cases

holding state and federal statutes unconstitutional and this philosophy prevailed when the Liggett Co. v. Baldridge case was decided by the court in 1928.

Current evidence of the shift in emphasis and philosophy of the Supreme Court is found in a recent case decided in 1963. The court sustained the constitutionality of a state law prohibiting other than lawyers from engaging in the business of debt adjusting or debt-pooling. The language of the court indicates its attitude:

> "There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable; that is unwise or incompatible with some particular social or economic philosophy. . . This intrusion by the judiciary into the realm of legislative value judgments was strongly objected to at the time, particularly by Mr. Justice Holmes and Mr.

Justice Brandeis.

"The doctrine that prevailed in the Lochner, Coppage, Adkins, Burns, and like cases, that due process authorizes courts to hold laws unconstitutional, when they believe the legislature has acted unwisely, has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.

"We conclude that the Kansas legislature was free to decide for itself that legislation was needed to deal with the business of debt-adjusting . . . and we emphatically refuse to go back to the time when courts used the Due Process Clause to strike down state laws, regulatory of business and industrial conditions, because they are unwise, improvident, or out of harmony with a particular school of thought. . . ."

Ferguson v. Skrupa, 372 U.S. 726 729, 730, 731, 732 (1963).

With the change in emphasis and philosophy the present United States Supreme Court we feel would uphold the type of

law declared unconstitutional in 1928 in the Liggett v. Baldridge case and that the effect and holding of that case should be reviewed and changed through the granting of this Petition for Writ of Certiorari.

We feel that Section 43-15-35(5) of the North Dakota Century Code is a valid exercise of the police power of the State of North Dakota and does bear a real and substantial relation to the public health, safety, morals, and general welfare.

It is submitted that the Supreme Court of North Dakota erred in holding that it was bound by the Liggett Co. v. Baldridge case and in holding that Section 43-15-35(5) of the North Dakota Century Code violates the due-process clause of Section 1 of the Fourteenth Amendment to

the United States Constitution.

CONCLUSION

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Frederick E. Saefke, Jr.
Counsel for Petitioner
411 North Fourth Street
Post Office Box 1874
Bismarck, North Dakota 58501

A. William Lucas
Conmy, Conmy, Rosenberg & Lucas
Counsel of Record
411 North Fourth Street
P. O. Box 1398
Bismarck, North Dakota 58501

February 20, 1973

PROOF OF SERVICE - CERTIFICATE OF SERVICE - SERVICE BY MAIL

I, Frederick E. Saefke, Jr., attorney for petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on February 23, 1973, I served a copy of the foregoing and attached Petition for Writ of Certiorari on Snyder's Drug Stores, Inc., respondent herein, by mailing a copy in a duly addressed envelope, with first class postage prepaid, to Mart R. Vogel, Wattam, Vogel, Vogel & Peterson, attorneys of record for respondent Snyder's Drug Stores, Inc. at Broadway and First Avenue North, Post Office Box 1389, Fargo, North Dakota 58102.

Frederick E. Saefke, Jr.
411 North Fourth Street
Post Office Box 1874
Bismarck, North Dakota 58501

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Snyder's Drug Stores, Inc.,
Respondent

v.

North Dakota State Board of Pharmacy,
Appellant

Civil No. 8834

1. The police power may be exerted in the form of state legislation where otherwise the effect may be to invade the rights guaranteed by the Fourteenth Amendment only when such legislation bears a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare.

2. A state cannot, under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them.

3. Being bound by the decision of the United States Supreme Court in Liggett Co. v. Baldridge, 278 U.S. 105, 49 S.Ct. 57, 73 L.Ed. 204 (1928), and seeing in-

sufficient basis for distinguishing that decision from the instant case, we sustain the trial court's conclusion that Section 43-15-35(5), N.D.C.C., violates the due-process clause of Section 1 of the Fourteenth Amendment to the United States Constitution.

4. Because no evidentiary hearing was held by the Board of Pharmacy on the application for a permit, we remand the case to the trial court with instructions to it to remand the case to the Board of Pharmacy for an administrative hearing on the application, sans the constitutional issue, pursuant to our Administrative Agencies Practice Act.

(Syllabus by the Court)

Appeal from the District Court of Burleigh County, the Honorable M. C. Fredricks, Judge.

JUDGMENT AFFIRMED IN PART, REVERSED IN PART.

Opinion of the Court by Erickstad, J.

Conmy, Conmy, Rosenberg, Lucas & Olson, Box 1398, Bismarck, for Appellant.

Wattam, Vogel, Vogel & Peterson, Box 1389, Fargo, for Respondent.

Snyder's Drug Stores, Inc.
v.
North Dakota State Board of Pharmacy

Erickstad, Judge.

The North Dakota State Board of Pharmacy appeals from the summary judgment ordered by the district court of Burleigh County, which requires the Board to issue a permit to Snyder's Drug Stores, Inc., to operate a pharmacy in the Red Owl Family Center in Bismarck, North Dakota. The judgment is dated January 6, 1972.

An application for a permit to operate a pharmacy was filed on the 25th of January 1971 by Lloyd D. Berkus, as president of Snyder's Drug. As indicated by various documents filed with the application, Snyder's Drug was to lease an area in the store building operated by Red Owl in Bismarck, North Dakota. A part of the store building was to be remodeled to meet the requirements of the Pharmacy Board.

On receipt of the application, the secretary of the Pharmacy Board investigated the proposed site and subsequently filed a report with the Pharmacy Board.

Without complying with Section 28-32-07, N.D.C.C., and without a hearing, the Pharmacy Board denied the application.

The denial is contained in the Pharmacy Board's findings of fact, conclusions of law, and order, dated March 22, 1971. Basically, the Board found that the existing facilities of the applicant did not meet the standards required by the Pharmacy Board and that the applicant failed to comply with Subsection 5 of Section 43-15-35, N.D.C.C. This subsection requires in the case of a corporate applicant that the majority of the stock be owned by registered pharmacists in good standing, who are actively and regularly employed in and responsible for the management, supervision, and operation of the pharmacy.

By notice of appeal dated April 12, 1971, Snyder's Drug appealed from the Board's order denying the application. In its specifications of error it asserted that Section 43-15-35(5), N.D.C.C. is unconstitutional, in that it violates the equal-protection and the due-process clause of Section 1 of the Fourteenth Amendment to the United States Constitution, and Sections 11 and 20 of the North Dakota Constitution. It also asserted that the Board's findings that it failed to comply with the regulations of the Board were not supported by the evidence and were not in accordance with the law.

On appeal to the district court, a motion for summary judgment was made by

Snyder's Drug. The trial court granted the motion upon the ground that Section 43-15-35(5), N.D.C.C., violates the previously described sections of the Constitutions of the United States and of North Dakota. It apparently further concluded that Snyder's Drug had satisfactorily complied with all reasonable regulations of the Board of Pharmacy entitling it to a permit to do business as a pharmacy.

Because the constitutional question is most crucial, we shall consider it first.

The case relied upon by the trial court in rendering its order and by Snyder's Drug in resistance to the appeal is Liggett Co. v. Baldridge, 278 U.S. 105, 49 S.Ct. 57, 73 L.Ed. 204 (1928).

In Baldridge, the United States Supreme Court was considering the constitutionality of a Pennsylvanis statute enacted in 1927. That statute required in the case of corporations, associations, and co-partnerships that all the partners or members thereof should be licensed pharmacists, with the exception that such corporations which were already organized and existing and duly authorized and empowered to do business in the state and owned and conducted pharmacies in the state, and which at the time of the passage of the Act still owned and conducted pharmacies in the state, could continue to do so.

Liggett Company, which at the time of the passage of the Act was empowered to own and conduct, and did own and conduct, pharmacies in the state, purchased two additional pharmacies, and it was in conjunction with the operation of these two additional pharmacies that the company was threatened with prosecution. The company sought to enjoin the attorney general and the district attorney from prosecuting it. The lower court, composed of three judges, held that the statute was constitutional upon the ground that there was a substantial relation to the public interest in the ownership of a drugstore where prescriptions were compounded.

The majority of the United States Supreme Court, speaking through Justice Sutherland, found the Act to be unconstitutional, in contravention of the due-process clause of the Fourteenth Amendment to the United States Constitution.

A pertinent part of the Sutherland opinion follows:

> "The police power may be exerted in the form of state legislation where otherwise the effect may be to invade rights guaranteed by the Fourteenth Amendment only when such legislation bears a real and substantial relation to the public health, safety, morals, or some other phase of the general

welfare. Here the pertinent question is: What is the effect of mere ownership of a drug store in respect of the public health?

"A state undoubtedly may regulate the prescription, compounding of prescriptions, purchase and sale of medicines, by appropriate legislation to the extent reasonably necessary to protect the public health. And this the Pennsylvania Legislature sought to do by various statutory provisions in force long before the enactment of the statute under review. Briefly stated, these provisions are: No one but a licensed physician may practice medicine or prescribe remedies for sickness; no one but a registered pharmacist lawfully may have charge of a drug store; every drug store must itself be registered, and this can only be done where the management is in charge of a registered pharmacist; stringent provision is made to prevent the possession or sale of any impure drug or any below the standard, strength, quality and purity as determined by the recognized pharmacopoeia of the United States; none but a registered pharmacist is permitted to compound physician's prescriptions; and finally, the supervision of the foregoing matters and the enforcement of the laws in respect thereof are in the hands of the State Board of Phar-

macy, which is given broad powers for these purposes.

"It therefore will be seen that without violating laws, the validity of which is conceded, the owner of a drug store, whether a registered pharmacist or not, cannot purchase or dispense impure or inferior medicines; he cannot, unless he be a licensed physician, prescribe for the sick; he cannot unless he be a registered pharmacist, have charge of a drug store or compound a prescription. Thus, it would seem, every point at which the public health is likely to be injuriously affected by the act of the owner in buying, compounding, or selling drugs and medicines is amply safeguarded.

"The act under review does not deal with any of the things covered by the prior statutes above enumerated. It deals in terms only with ownership. It plainly forbids the exercise of an ordinary property right and, on its face, denies what the Constitution guarantees. A state cannot, 'under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them.'" Liggett Co. v. Baldridge, 278 U.S. 105, 49 S.Ct. 57 at 59, 73 L.Ed. 204 (1928).

Justice Holmes, joined by Justice Brandeis, filed a short dissent. A part of the dissent follows:

> "A standing criticism of the use of corporations in business is that it causes such business to be owned by people who do not know anything about it. Argument has not been supposed to be necessary in order to show that the divorce between the power of control and knowledge is an evil. The selling of drugs and poisons calls for knowledge in a high degree, and Pennsylvania after enacting a series of other safeguards has provided that in that matter the divorce shall not be allowed. Of course, notwithstanding the requirement that in corporations hereafter formed all the stockholders shall be licensed pharmacits, it still would be possible for a stockholder to content himself with drawing dividends and to take no hand in the company's affairs. But obviously he would be more likely to observe the business with an intelligent eye than a casual investor who looked only to the standing of the stock in the market. The Constitution does not make it a condition of preventive legislation that it should work a perfect cure. It is enough if the questioned act has a manifest tendency to cure or at least to make the evil less. It has been recognized by the professions, by statutes and by

> decisions that a corporation offering professional services is not placed beyond legislative control by the fact that all the services in question are rendered by qualified members of the profession. (Citations omitted.)
>
> "But for decisions to which I bow I should not think any conciliatory phrase necessary to justify what seems to me one of the incidents of legislative power. I think however that the police power as that term has been defined and explained clearly extends to a law like this, whatever I may think of its wisdom, and that the decree should be affirmed.
>
> "Of course the appellant cannot complain of the exception in its favor that allows it to continue to own and conduct the drug stores that it now owns. The Fourteenth Amendment does not forbid statutes and statutory changes to have a beginning and thus to discriminate between the rights of an earlier and those of a later time." Liggett Co. v. Baldridge, supra, 49 S.Ct. 57 at 60.

The Board of Pharmacy contends that Baldridge may be distinguished from the instant case on the basis of the statutory provisions. They point out that the Pennsyl-

vania statute required that one hundred percent of the stock of the corporation be owned by pharmacists, whereas the North Dakota statute required only that a majority of the stock be owned by pharmacists. The Board further emphasizes that the North Dakota statute is concerned with control rather than mere ownership.

We do not believe that this difference is significant, particularly in light of the fact that under the Pennsylvania statute requiring pharmacists to own one hundred percent of the stock, control was of necessity in pharmacists much the same as under the North Dakota statute, which requires that the majority stock be owned by registered pharmacists in good standing, who are actively and regularly employed in and responsible for the management, supervision, and operation of the pharmacy.

The Board of Pharmacy contends that this case should be remanded for an evidentiary hearing before it relative to the constitutionality of the Act. It contends that although the constitutional issue was argued before the trial court, no evidence as such was submitted to the trial court on this issue, and accordingly, because this was an appeal from an administrative agency to the trial court, that if any evidence is to be submitted on this issue the case should be remanded to the administrative agency for that purpose.

Since no transcript has been certified to this court of the proceedings before the trial court, we do not know what took place before the trial court; but it does not appear from any of the arguments made in this court that a motion to remand the case to the administrative agency was made by any party for any purpose when the case was being considered by the trial court.

In respect to the facts relative to the constitutional issue, we find ourselves in the same position as the majority of the United States Supreme Court in Baldridge.

We quote:

"In the light of the various requirements of the Pennsylvania statutes, it is made clear, if it were otherwise doubtful, that mere stock ownership in a corporation, owning and operating a drug store, can have no real or substantial relation to the public health; and that the act in question creates an unreasonable and unnecessary restriction upon private business. No facts are presented by the record, and, so far as appears, none were presented to the Legislature which enacted the statute, that properly could give rise to a different conclusion. It is a matter of public notoriety that chain drug

> stores in great numbers, owned and operated by corporations, are to be found throughout the United States. They have been in operation for many years. We take judicial notice of the fact that the stock in these corporations is bought and sold upon the various stock exchanges of the country and, in the nature of things, must be held and owned to a large extent by persons who are not registered pharmacists. If detriment to the public health thereby has resulted or is threatened, some evidence of it ought to be forthcoming. None has been produced, and, so far as we are informed, either by the record or outside of it, none exists. The claim, that mere ownership of a drug store by one not a pharmacist bears a reasonable relation to the public health, finally rests upon conjecture, unsupported by anything of substance." Liggett Co. v. Baldridge, supra, 49 S.Ct. 57, at 59, 60. (Emphasis added.)

Having no assurance from the Board of Pharmacy that specific evidence lacking in Baldridge and so far lacking in the instant case could be supplied on a remand, notwithstanding the Board's request that this case be remanded to the trial court with instructions to remand to the Phar-

macy Board for an evidentiary hearing on the constitutional issue, and because of the Board's failure to this date to produce such evidence, we hold that this request comes too late.

Being bound by the decision of the United States Supreme Court in Baldridge, and seeing insufficient basis for distinguishing that decision from the instant case, we sustain the trial court's conclusion that Section 43-15-35(5), N.D.C.C., violates the due-process clause of Section 1 of the Fourteenth Amendment to the United States Constitution.

Since genuine issues of material facts otherwise exist in conjunction with the application on the part of Snyder's Drug for a permit, the motion for summary judgment as to those issues should have been denied by the trial court under Rule 56 of the North Dakota Rules of Civil Procedure.

Because no evidentiary hearing was held by the Board of Pharmacy on the application for a permit, we remand the case to the trial court with instructions to it to remand the case to the Board of Pharmacy for an administrative hearing on the application, sans the constitutional issue, pursuant to our Administrative Agencies Practice Act. See especially Sections 28-32-07, 28-32-18, and 28-32-19, N.D.C.C.

For the reasons stated, the judgment of the trial court is affirmed as it relates to the constitutional issue and reversed as it relates to the applicant's proof that it is otherwise qualified to receive a permit to operate a pharmacy under North Dakota law and the regulations of the North Dakota Board of Pharmacy.

RALPH J. ERICKSTAD
WM. L. PAULSON
OBERT C. TEIGEN
HARVEY B. KNUDSON
ALVIN C. STRUTZ, C.J.

File No. 8834

STATE OF NORTH DAKOTA)
) ss.
In the Supreme Court,)
Appeal from the District Court of Burleigh County.

Snyder's Drug Stores, Inc.,

Respondent

v.

North Dakota State Board of Pharmacy,

Appellant

This action coming on to be heard at the September A.D. 1972 term of this Court at the Supreme Court rooms in the City of Bismarck, State of North Dakota:

Present: The Honorable Alvin C. Strutz, Chief Justice; the Honorable Obert C. Teigen, the Honorable Ralph J. Erickstad, the Honorable Harvey B. Knudson, the Honorable Wm. L. Paulson, Associate Justices; and the appeal herein having been argued by Mr. A. William Lucas for the Appellant and argued by Mr. C. Nicholas Vogel for Respondent and the court having been advised thereon it is now considered, ordered and adjudged that the judgment of the said District Court within and for said

Burleigh County appealed from herein, be and the same is hereby AFFIRMED IN PART, REVERSED IN PART IN ACCORDANCE WITH OPINION FILED HEREWITH.

AND IT IS FURTHER ORDERED, That this cause be and it is hereby remanded to the District Court for further proceedings according to law, and the order of this court.

AND IT IS FURTHER CONSIDERED AND ADJUDGED, That Neither Party have and recover of the costs and disbursements on this appeal expended, to be taxed and allowed in the District Court.

Dated October 31, 1972.

By the Court,

s/ Alvin C. Strutz
Chief Justice.

Attest:

s/Luella Dunn
Clerk.

File No. 8834

STATE OF NORTH DAKOTA,)
) ss.
In the Supreme Court)

Appeal from the District Court of Burleigh County.

Snyder's Drug Stores, Inc.,

Respondent

v.

North Dakota State Board of Pharmacy,

Appellant

This action coming on to be heard at the September A.D. 1972 term of this Court at the Supreme Court room, in the City of Bismarck, State of North Dakota;

Present: The Honorable Alvin C. Strutz, Chief Justice; the Honorable Obert C. Teigen, the Honorable Ralph J. Erickstad, the Honorable Harvey B. Knudson, the Honorable Wm. L. Paulson, Associate Justices; and a petition for a rehearing upon the appeal herein having been filed by Mr. A. William Lucas for the Appellant and the court having advised thereon, it is now here considered, ordered and adjudged, that the petition be and the same is hereby DENIED.

AND IT IS FURTHER ORDERED, that this cause be and it is hereby remanded to the District Court for further proceedings according to law, and the judgment of this court.

Dated November 29, 1972.

BY THE COURT,

s/ Alvin C. Strutz
Chief Justice.

Attest:

s/ Catherine Fox
Deputy Clerk

STATE OF NORTH DAKOTA IN DISTRICT COURT

COUNTY OF BURLEIGH FOURTH JUDICIAL DISTRICT

Snyder's Drug Stores, Inc.,

Appellant.

vs.

North Dakota State Board of Pharmacy,

Respondent.

JUDGMENT ON REMITTITUR

Upon the Order for Judgment on Remittitur made and filed in the above entitled action under date of December 29, 1972, it is

ORDERED, ADJUDGED AND DECREED that Section 43-15-35(5) of the North Dakota Century Code is unconstitutional and of no force and effect, and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that within sixty days from the date hereof the pharmacy board conduct an administrative hearing on the appellant's application for a pharmacy permit to determine whether, apart from the ownership requirement, the appellant is

qualified to receive a permit to operate a pharmacy under North Dakota law and the regulations of the North Dakota Board of Pharmacy, and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that neither party shall recover its costs and disbursements.

WITNESS the Honorable M. C. Fredricks, Judge of the District Court, Fourth Judicial District, Burleigh County, North Dakota, and my hand and seal of said Court this 4th day of January, 1973.

s/ Thora Dennis
Clerk of the District Court

State of North Dakota
Supreme Court
Bismarck

Clerk of the Supreme Court
Mrs. Luella Dunn

December 4, 1972

Conmy, Conmy, Rosenberg, Lucas & Olson
Attorneys at Law
Box 1398
Bismarck, North Dakota 58501

Re: Our file #8834

Gentlemen:

The Court entered an order denying the petition for rehearing in the case of Snyder's Drug Stores, Inc. v. N. Dak. State Board of Pharmacy on November 29, 1972.

Accordingly, the remittitur is being forwarded to the Clerk of the District Court of Burleigh County today.

Sincerely yours,

s/ LUELLA DUNN
Luella Dunn
Clerk

LD:cf

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1176

NORTH DAKOTA STATE BOARD OF PHARMACY,
Appellant

v.

SNYDER'S DRUG STORES, INC.,
Appellee

On Writ of Certiorari to the Supreme Court of North Dakota

JOINT BRIEF AMICUS CURIAE OF THE AMERICAN PHARMACEUTICAL ASSOCIATION AND THE NATIONAL ASSOCIATION OF RETAIL DRUGGISTS

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PRELIMINARY STATEMENT

The American Pharmaceutical Association and the National Association of Retail Druggists file this joint brief amicus curiae, urging that the October 31, 1972, decision and order of the Supreme Court of North Dakota be reversed, and further urging that this Court's decision in *Liggett Co.* v. *Baldrige*, 278 U.S. 105 (1928) be overruled, to the extent that *Baldrige* may apply to the facts of this case.

INTEREST OF THE AMICI

The American Pharmaceutical Association (APhA) is a non-profit, membership corporation organized and existing under the laws of the District of Columbia since 1852. It is the national professional society of pharmacists in the United States, and its membership consists of more than 39,000 practicing pharmacists and pharmaceutical scientists and educators. Additionally, over 12,000 students enrolled in colleges of pharmacy hold membership in APhA.

The APhA and, of course, its members are vitally interested in the public health and welfare as they may be affected by the profession of pharmacy. In that regard, APhA exists for the purposes of rendering assistance in improving, promoting, and safeguarding the public health and welfare by: (1) maintaining an official compendium of drug standards and specifications; (2) promoting the safe use of drugs; (3) fostering and encouraging inter-professional relations; (4) improving the art and science of pharmacy for the general welfare by the dissemination of scientific information relating to drugs; (5) providing a system of education and training in the art of pharmacy; (6) supporting a system of licensure and registration of pharmacists; (7) developing, maintaining and enforcing a code of ethics for pharmacists calculated to safeguard the public; and (8) cooperating with the United States Government to the fullest in conducting research, examinations, investigations, experiments and in disseminating information.

One of the fundamental purposes of the APhA is the development, maintenance and enforcement of a professional code of ethics. The current version of the APhA Code of Ethics was adopted by vote of the

membership in August, 1969, and sets forth four canons which are particularly relevant to the public issues to be decided by this Court in this case. Underlying these four relevant canons is the membership philosophy that a pharmacist is a professional whose acts and practices affect the public interest and welfare and, accordingly, whose acts and practices must be conducted with the public interest foremost in mind. The four canons provide:

> Section 1
>
> A pharmacist should hold the health and safety of patients to be of first consideration; he should render to each patient the full measure of his ability as an essential health practitioner.
>
> Section 2
>
> A pharmacist should never knowingly condone the dispensing, promoting or distributing of drugs or medical devices, or assist therein, which are not of good quality, which do not meet standards required by law or which lack therapeutic value for the patient.
>
> Section 3
>
> A pharmacist should always strive to perfect and enlarge his professional knowledge. He should utilize and make available this knowledge as may be required in accordance with his best professional judgment.
>
> . . .
>
> Section 7
>
> A pharmacist should not agree to practice under terms or conditions which tend to interfere with or impair the proper exercise of his professional judgment and skill, which tend to cause a deterioration of the quality of his service or which require him to consent to unethical conduct.

The other joint amicus, the National Association of Retail Druggists (NARD), is a non-profit Illinois corporation whose membership consists of about 40,000 practicing pharmacists who own and control community pharmacies in the United States. Because it and its membership have the same goal as the APhA in assuring that the profession of pharmacy continues to conduct itself with the public interest and welfare foremost in mind, and because this Court's decision in this case will have major impact in attaining that goal, it joins with the APhA as an amicus in this case. In that regard, one of NARD's purposes is to assure professional control of the pharmacy by pharmacists. Both the APhA and NARD, on behalf of their members, believe that consistent with the modern concept of federalism, the States are not precluded by outmoded concepts of substantive Due Process from enacting pharmacy ownership statutes similar to the North Dakota Statute involved in this case. It is submitted that the North Dakota legislature, in its wisdom, was entitled to enact this reasonable ownership statute to eliminate what the legislature found to be an evil. We submit that this legislation should be sustained on the ground that this Court cannot say that the statute is not reasonably calculated to promote the public health and welfare.

Indeed, your amici have found that control by lay persons over the practice of pharmacy can be detrimental to the public interest. The practicing pharmacist is subjected to continually increasing pressures in many employment situations which leave him squarely with the Hobson's choice to be made between the economic objectives of his non-pharmacist master and his professional responsibilities such as those set

forth in the APhA Code of Ethics, as well as by his own professional judgment. Thus, the interest of your amici is directed at highlighting for the court the basic social and legal policy issue of whether professional ethics and performance are to be determined, controlled or dictated by professions themselves, or whether professional ethics and performance are to be determined, controlled or dictated by lay persons whose motivation may frequently be based not on professional or public welfare considerations, but rather on private economic interests. The State of North Dakota has answered that question by insisting that drug stores be controlled by professionals. That decision, we submit, the State is entitled to make under its police power.

ARGUMENT

SECTION 43-15-35(5) OF THE NORTH DAKOTA CENTURY CODE IS RATIONALLY RELATED TO THE PUBLIC HEALTH, SAFETY AND WELFARE.

The States have wide latitude in the exercise of their police powers, both in determining what the interests of the public require and in deciding on "reasonably necessary" means for the protection of those interests. Provided the legislative provision does not abridge a specific constitutional right, this court has stated that it will not substitute its judgment for that of the legislature. As this Court noted in *Williamson* v. *Lee Optical of Oklahoma,* 348 U.S. 483, 488 (1955), "it is enough that there is an evil at hand for correction and that it might be thought that the particular legislative measure was a rational way to correct it."

In the instant appeal, the evil at hand was the control of professional pharmacists by lay persons. The clear intent of the North Dakota legislature in framing

Section 43-15-35(5) of the North Dakota Century Code was to prevent the control of the profession of pharmacy by laymen and to assure professional guidance in the determination of pharmacy practices and policies. In the judgment of the legislature, the profession of pharmacy required, for the public welfare and for its own integrity, control over the exercise of its professional responsibilities to be vested in the profession itself rather than in professionally disinterested outsiders. Pharmacy is indeed a profession, and thus subject to far-reaching legislation under the state's police power. North Dakota, under its police power, was entitled to conclude through such preventive legislation that public health, safety and welfare would be furthered by a requirement that drug stores serving citizens of the State must be controlled by licensed professional pharmacists.

It is difficult to conclude with certainty that North Dakota, by requiring at least 51 percent control of pharmacies by professionals, will accomplish a perfect cure of the lay ownership evil perceived by the State. But as Justice Holmes recognized in his dissent in *Baldrige,* "the Constitution does not make it a condition of preventive legislation that it should work a perfect cure." 278 U.S. 105, 115 (1928). This Court has wisely held that it does not sit as a "superlegislature" to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. *See, e.g., Griswold* v. *Connecticut,* 381 U.S. 479, 482 (1965). For these reasons, we respectfully submit that the *Baldrige* decision is a judicial anachronism, no longer controlling or persuasive on the issues presented by this appeal. Because appellant has covered these points in its brief, there is

no need for your amici to enlarge on them except to state that APhA and NARD fully adopt and support appellant's position on this matter.

A. Pharmacy Is a Profession With All the Public Duties and Responsibilities Which that Status Entails.

This Court's 1928 decision in *Liggett* v. *Baldrige*, 278 U.S. 105 (1928) appears to conceive of the practice of pharmacy as a trade or occupation rather than a profession vitally affecting the public welfare. The Court concluded that the public interest in Pennsylvania was adequately safeguarded by related State legislation controlling the prescription, compounding, purchase and sale of medicines. Usurping the function of the State legislature, this Court concluded that ownership of a pharmacy by lay persons was unrelated to the public welfare, and therefore found that the statutory proscription overstepped the bounds of the Fourteenth Amendment's Due Process Clause.

The cases are legion that a State is empowered to closely regulate a profession, particularly one closely related to public health and safety. Pharmacy, without question, is such a profession; and today many States expressly recognize by statute the professional status of pharmacy.[1] Other States refer indirectly to the status of pharmacy as a profession; and many courts have concluded that pharmacy enjoys that status.[2] While it is possible that pharmacy may not

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[1] Colo. Rev. Stat. 1963, 48-1-25; Ill. Rev. Stat. 1965, ch. 91, § 55.1; La. Rev. Stat. § 37: 1206 (Supp. 1960); Nev. Rev. Stat. 1957, 639.213; Okla. Stat. 1961, Title 59, § 353.2; Tex. Rev. Civ. Stat. 1948, Art. 4542a, § 20; Va. Code Ann. § 54-399(a) (1967).

[2] *See, e.g., Supermarket General Corp.* v. *Sills*, 93 N.J. Super. 32, 225 A.2d 728 (1966); *Lee* v. *Gaddy*, 133 Fla. 749, 183 So. 4 (1938); and *Sashihara* v. *State Bd. of Pharmacy*, 8 Cal. App. 2d 69, 46 P.2d 804 (1935).

have been considered by this court as a profession in *Baldrige*, the concept of a profession is not static. For example, this court in *United States* v. *Laws*, 163 U.S. 258, 266 (1896) noted:

> "Formerly, theology, law, and medicine were known as *the professions;* as the applications of science and learning are extended to other departments of affairs, other vocations also receive the name. The word implies professed attainments in special knowledge as distinguished from mere skill. A practical dealing with affairs as distinguished from mere study or investigation; and an application of such knowledge to uses for others as a vocation, as distinguished from its pursuit for its own purposes."

An examination of the professional requirements for the practice of pharmacy demonstrates that the North Dakota classification of pharmacy as a profession is accurate. A registered pharmacist must be a graduate of one of the seventy-five accredited colleges of pharmacy, whose five-year program encompasses subjects such as organic chemistry, comparative anatomy, biochemistry, microbiology, physiology, chemical pharmacology, pharmacognosy, pharmaceutics, and qualitative analysis. The North Dakota pharmacist must have a year of practical experience as a pharmacy intern and pass an examination set by the Board of Pharmacy (N.D. Century Code § 43-15-15). Indeed, similar internship requirements are a condition of licensing in all states. A pharmacist must have extensive knowledge of a wide range of drugs, including familiarity with the recommended safe dosages for adults and children, storage requirements, quality standards, and the administering problems a patient might have. He must carefully comply with federal

and state regulations concerning the dispensing of "prescription-legend drugs," those designated by the Food, Drug, and Cosmetic Act as not safe for use except under the professional supervision of the physician and pharmacist. 21 U.S.C. § 353. Above all, he must assure the propriety of and the complete accuracy in the prescriptions he dispenses, whether these contain prefabricated dosage forms or ingredients he must still compound himself. An error of judgment as well as an error in the process of dispensing might well be fatal to the patient.

A pharmacist may be held liable for errors resulting from a failure to exercise "professional judgment." One of the most valuable professional services he can render is to *refuse* to dispense a medication if in his professional judgment he feels it would injure the patient or violate a law. *Tarleton* v. *Lagarde,* 16 So. 180, 26 LRA 325 (1894). A pharmacist cannot necessarily escape liability by claiming he filled the prescription as written.

> "The instant contention [of non-liability] is primarily based upon the assumption that the pharmacist is obliged to fill any and all prescriptions. Such is not the law. As a chemist he may know that the physician has erred in the prescription and that to fill it might cause death or serious injury to the patient." *Jones* v. *Walgreen Co.,* 265 Ill. App. 308 (Ill. 1932)

He must exercise professional judgment concerning the authenticity and accuracy of the prescription. In addition, a pharmacist has been held liable for the consequences of failing to advise a patient of the danger of using a particular drug in conjunction with another the pharmacist knows the patient is using. He has

a basic legal and ethical duty to advise the patient concerning the proper use and possible side effects of the medication. *Fuhs* v. *Barber,* 140 Kan. 373, 36 P.2d 962 (1934); and *Krueger* v. *Knutson,* 261 Minn. 144, 111 N.W.2d 526 (1961).

There is a category of drugs to be dispensed personally by a pharmacist at his discretion at the request of the patient (subject to state law), such as a number of drug products (cough suppressants, anti-diarrhea preparations) containing Schedule V controlled substances under the Controlled Substances Act, 21 U.S.C. §§ 812, 829. Under the regulations implementing this Act (21 CFR § 306.32), the pharmacist has personal and direct responsibility for determining medical need. For example, he cannot legally or ethically delegate his professional judgment in this area. The advice of a pharmacist to a patient concerning self-medication with non-prescription products is also a vital service clearly affecting the public interest and welfare.

Many pharmacists maintain, as a professional service, patient medication record systems in which individual patient information, including allergies, idiosyncracies and patient age, is retained and in which each prescription is entered. The system is used as a monitoring device to ensure that the prescription is appropriate for the particular patient and that the various drugs a patient is taking are not contraindicated. Such a problem could arise if the patient were seeing several physicians for different complaints.

This service is now required by a New Jersey Board of Pharmacy regulation to be provided by all New Jersey pharmacies. (N.J.A.C. 13:39-15). The New Jersey "patient profile record system" allows the im-

mediate retrieval of all data concerning prior medications and allergies of the patient. The pharmacist is required to check the record before dispensing the medication to determine the possibility of a harmful drug interaction or reaction. Further, he is to take appropriate action to avoid or minimize the problem, including consultation with the physician. This Board of Pharmacy regulation was attacked by several major, lay-controlled drug chains. But in an opinion handed down on May 8, 1973, a New Jersey court found sufficient evidence indicating the need for the regulation and sustained its validity. The court quoted with approval an article by Dr. Karl Neumann of Cornell Medical College:

> "He said by keeping records of all purchases, staying abreast of the latest reports of toxicity, noting previous allergic and adverse reactions of individuals and recording excessive purchase of any one item, the pharmacist could suddenly become one of the most important members of the health team." *Rite Aid of New Jersey, Inc.* v. *Board of Pharmacy of the State of New Jersey*, — N.J. Super. — (App. Div. 1973) (Case #A-1966-71)

B. Non-Professional Ownership of Pharmacies Has Resulted in Actual Control Over Pharmacists by Lay Persons or Entities, Thereby Adversely Affecting Their Professional Practice and Consequently the Public Welfare.

In 1972, the corporate chain drug store controlled 60.1% of the total national drug sales volume, amounting to $1.5 billion. This incursion by the commercial venture poses a serious threat to pharmacists and the public. When purely commercial interests wholly own or control pharmacies, the policies, practices and conduct of pharmacies have frequently been unduly influenced by commercial considerations. These abuses

range from the creation of an unprofessional environment and adverse working conditions to serious infringements on the pharmacist's responsibility for the control and dispensing of drugs.

The most serious abuses concern actual interference with the ordering and dispensing of drugs. In some instances, unauthorized non-professional personnel have dispensed prescription drugs, resulting in an obvious and serious health risk. In other cases, owners, for the sake of economy, have limited the drugs in stock to those which are subject to high volume. This policy is usually accompanied by a refusal to dispense drugs which require pharmacist compounding. A curtailment of the inventory is a threat to those patients who need such infrequently used drugs. It is an indisputable fact that the owners of a pharmacy have considerable influence in determining what quality and amount of equipment and stock will be ordered. Professional control of the pharmacy is needed to reduce that possibility that such abuses may occur.

Justice Holmes in his dissent in *Liggett Co.* v. *Baldrige* stated that:

> "A standing criticism of the use of corporations in business is that it causes such business to be owned by people who do not know anything about it. Argument has not been supposed necessary to show that the divorce between the power of control and knowledge is an evil. The selling of drugs and poisons calls for knowledge in a high degree, and Pennsylvania after enacting a series of other safeguards has provided that in that matter the divorce shall not be allowed." 278 U.S. at 114.

The divorce between control and professional knowledge leads to a lack of accountability for improper

actions. The employee pharmacist could argue practical compulsion and obedience to orders, while the employer could disclaim responsibility by pointing out that he merely hired. Indeed, it is true that lay management is not equipped to supervise adequately the professional staff. A particular pharmacist's incompetency could go unnoticed. Or the unlicensed employer could create a situation thwarting the pharmacist's professional efforts. In either case, the public loses the additional safety precaution of a management professionally trained and legally accountable for unethical conduct.

With control of the pharmacy in foreign hands, the pharmacist is often unable to establish policy or react to established policy over the pharmacy department itself. He finds himself forced into an employee role in which, fearing for job security, he is unable to protest practices which in his professional judgment are not aimed at the public welfare. Under Section 1 of the APhA Code of Ethics, a pharmacist must hold the health and safety of patients to be of first consideration; he should render to each patient the full measure of his ability as an essential health practitioner. Overriding commercial and profit goals and dilution of the pharmacist's attention with non-professional duties create an atmosphere where professionalism is adversely affected. In addition, abiding by Section 2 is likely to bring the pharmacist in direct confrontation with commercial pressures:

> "A pharmacist should never knowingly condone the dispensing, promoting, or distribution of drugs or medical devices, or assist therein, which are not of good quality, which do not meet standards required by law or which lack therapeutic value for the patient."

A drug store's practice of large scale promotions with a profit motive must upon occasion force a pharmacist into both unethical conduct and conduct injurious to the public.

While arguably less serious than practices opening up the possibility of unethical conduct, abuses have also occurred in the area of working conditions. These too pose a public health hazard serious enough to be condemned by Section 7 of the APhA Code of Ethics:

> "A pharmacist should not agree to practice under terms and conditions which tend to interfere with or impair the proper exercise of his professional judgment and skill, which tend to cause a deterioration of the quality of his service or which require him to consent to unethical conduct."

As a practical matter, however, pharmacists are often powerless to object to such conditions. APhA has received complaints from employed pharmacists regarding grossly unreasonable working hours. All states and the District of Columbia require the presence of a licensed pharmacist at all times during which medication is dispensed. Some commercial owners, in an effort to avoid hiring additional pharmacists, have required the pharmacist to work, for example, 13-hour shifts and thirteen consecutive days. The files of APhA contain additional unfortunate cases of pharmacists forced to tend other parts of the store and spend time on such chores as refunding soda bottle deposits. While such abuses may occur under pharmacist owners, the likelihood of commercial pressures and insensitivity to the need for the pharmacist to be alert and responsive to the patient is far greater under non-pharmacist owners; at least it should be clear that a

State, in considering preventive legislation, is entitled to so conclude.

Lay concern for the commercial venture, minimizing, through ignorance or avarice, the importance of the standards of the profession and the protection of the public, has a detrimental effect on professional morale, on the maintenance of proper safeguards and standards, and hence on the public safety. In addition to this indirect effect, lay control directly touches the public whenever administrative decisions are made concerning budgets, purchases, dispensing and other professional functions in the pharmacy department.

One type of non-pharmacist ownership is commonly recognized as an economic, ethical and social evil from the public's point of view: physician-owned pharmacies. Senate hearings held in response to complaints from national pharmacists' organizations uncovered and documented serious abuses surrounding the ownership of pharmacies by physicians. Report of the Subcommittee on Antitrust and Monopoly to the Senate Committee on the Judiciary, Physician-Ownership in Pharmacies and Drug Companies, 89th Cong., 1st Sess. (1965). The report noted that patients have been told, directly or indirectly by the prescribing physician, to have their prescription filled in the pharmacy in which the doctor has an ownership interest. This is accomplished by transmitting the prescription directly to the pharmacy via a direct telephone line, writing the prescription in code, advertising the pharmacy on the prescription form, or orally instructing the patient. The danger is the temptation to charge higher prices for drugs, to overprescribe or to write unnecessary prescriptions. A monopoly develops which deprives

the patient of any choice in his health care. A physician has total authority to prescribe any medication dictating the brand and amount; should his prescription mean economic benefit to him, both an unethical situation and a very real health hazard could easily arise.

California has met this problem with a statute forbidding physician ownership of pharmacies. Cal. Bus. & Prof. Code, Sec. 654. See *Megan Medical Clinic* v. *California State Board of Medical Examiners*, 57 Cal. Rptr. 256 (1967) holding the statute constitutional. Pennsylvania and Maryland empower the State Board of Pharmacy to sanction pharmacists who are associated with a pharmacy in which a medical practitioner has an interest. Pa. Stat. Ann., Tit. 63 § 390-5(9)(xii)(Supp. 1964); Md. Ann. Code, Art. 73, § 266A(c)(4)(iii) (Supp. 1964).

C. The State in the Exercise of Its Police Power May Properly Prohibit Corporations or Laymen From Controlling the Profession of Pharmacy.

It is well established that the regulation of a profession is a proper exercise of the state's police power. Depending on the needs of society in relation to each profession, the state may refuse to allow non-professional corporations to practice professions. Medicine and law are the traditional examples. (Professional corporations are required by state statutes to have professional control and personal liability in order to protect the public). The Illinois Supreme Court, in upholding the constitutionality of a statute prohibiting corporations from practicing dentistry said:

> "... The law is well settled that the state may deny to corporations the right to practice professions and may insist upon the personal obligation

> of individual practitioners . . . and this holding has been made regardless of the fact of existing contracts and investments made and entered into by corporations which were engaged in the practice of professions . . . ." *Winberry* v. *Hallihan*, 361 Ill. 121, 197 N.E. 552, 556 (1935).

The Supreme Court, in *Semler* v. *Oregon State Board of Mental Examiners*, 294 U.S. 608 (1935), reached the identical conclusion. The Court stressed the importance of professional standards:

> "We do not doubt the authority of the State to estimate the baleful effects of such methods and to put a stop to them. The legislature was not dealing with traders in commodities, but with the vital interest of public health, and with a profession treating bodily ills and demanding different standards of conduct from those which are traditional in the competition of the market place. The community is concerned with the maintenance of professional standards which will insure not only competency in individual practitioners, but protection against those who would prey upon a public peculiarly susceptible to imposition through alluring promises of physical relief. And the community is concerned in providing safeguards not only against deception, but against practices which would tend to demoralize the profession by forcing its members into an unseemly rivalry which would enlarge the opportunities of the least scrupulous. What is generally called the "ethics" of the profession is but the consensus of expert opinion as to the necessity of such standards." 294 U.S. at 612.

A state's concern that a profession is demeaned and demoralized by lay control is therefore a highly legitimate reason for legislation—and not merely "rationally related" to the objective.

The Supreme Court in *Williamson* v. *Lee Optical of Oklahoma*, 348 U.S. 483 (1955), discussed a statute similar to North Dakota's pharmacy ownership provision and found the state's "attempt to free the profession [optometry], to as great an extent as possible, from all taints of commercialism" to be a rational objective. The statute in this case read:

> "No person, firm, or corporation engaged in the business of retailing merchandise to the general public shall rent space, sublease departments, or otherwise permit any person purporting to do eye examinations or visual care to occupy space in such retail store." 348 U.S. at 490-91.

The Court, following *Semler*, interpreted this statute as similar to a denial to a corporation of the right to practice dentistry. It concluded that:

> "Geographical location may be an important consideration in a legislative program which aims to raise the treatment of the human eye to a strictly professional level. We cannot say that the regulation has no rational relation to that objective and therefore is beyond constitutional bounds." 348 U.S. at 491.

Thus, for a number of rational reasons, a state may deny a corporation the right to practice a particular profession. As a necessary corollary, a corporation may also be forbidden to exercise indirectly control it is forbidden to exercise directly. Were this not the case, an unlicensed party would be directing the professional activities of a licensed party and in effect "practicing without a license".

The most common evils which arise when a corporation acts as employer of such professionals include the strong possibility of undue influence, the disconnection

of the professional relationship between client or patient and the practitioner, and the corruption of the practitioner's motivations. The South Carolina Supreme Court in *Ezell* v. *Ritholz,* 188 S.C. 39, 198 S.E. 419 (1938) commented on personal or individual responsibility as the ethical basis of any profession:

> "One who practices a profession is responsible directly to his patient or his client. Hence, he cannot properly act in the practice of his vocation as an agent of a corporation or business partnership whose interests in the very nature of the case are commercial in character." 198 S.E. at 424.

The Pennsylvania Supreme Court held in *Neill* v. *Gimbel Bros.,* 330 Pa. 213, 199 A. 178 (1938), that the vital importance to the public of the profession of optometry justified the state in regulating its proper practice. The statute prohibited corporations from practicing optometry; the corporation retail store was found to be practicing optometry since it controlled the optometrists. In *Gimbel,* an optical company operated an optical department in a retail store. The optometrists were hired and paid by the company but were under the control of the store; fees were set and collected by the store. The department store was held to be illegally engaged in the practice of optometry. The court rejected the contention that optometry was merely an incident to the corporate merchandising practice and held it rather to be a real science directed to the measurement, accommodation and refraction of the eye. Detailing the required curriculum and examination for a license, the court acknowledged it as an important profession. It noted that when a professional practitioner is the employee of a non-professional, subject to his control and dependent on him for a salary,

the likelihood is increased that the welfare of the patient will not be the sole criterion applied by the practitioner in rendering services to him. Quoting the Massachusetts Supreme Court in *McMurdo* v. *Getter*, 298 Mass. 363, 10 N.E.2d 139, 140 (1937), it noted that:

> "The rule is generally recognized that a licensed practitioner of a profession may not lawfully practice his profession among the public as the servant of an unlicensed person or a corporation; and that, if he does so, the unlicensed person or corporation employing him is guilty of practicing that profession without a license. A corporation as such cannot possess the personal qualities required of a practitioner of a profession. Its servants, though professional trained, and duly licensed to practice, owe their primary allegiance and obedience to their employer rather than to the clients or patients of their employer. The rule stated recognized the necessity of immediate and unbroken relationship between a professional man and those who engage his services." 199 A. at 181.

The Court in *Gimbel* found optometry to be a profession affected with a public interest.

> ". . . That case [Liggett] does not support the proposition that a licensed practitioner of a profession may be employed at a salary to render professional services to the customers of a person, partnership, or corporation, where the contractual relationship of the client or customers is, not with the practitioner, but with the latter's employer, and the chancellor decided as before noted that optometry is a profession. If a corporation hired a lawyer to render legal services under such arrangements, it would clearly be engaged in the practice of law. The legislature has the right to forbid such practice as contrary to public policy, which is properly concerned with the maintenance

> of high professional standards. One who practices a profession is apt to have less regard for professional ethics and to be less amenable to regulations for their enforcement when he has no contractual fees and is under the control of an employer whose commercial interest is in the volume of sales of merchandise effected by the prescriptions of the employee-practitioner. These features were entirely absent from the Liggett case." 199 A. at 182.

Certainly since pharmacy affects the public interest to the same, if not a greater degree, as optometry, it should be clear that a State under its police power may eliminate what it finds to be the evil of lay control. The court's reasoning in *Gimbel* as to the inapplicability of *Baldrige* to optometry demonstrates the underlying fallacies of the *Baldrige* rationale. North Dakota has the right to forbid lay control of pharmacies as contrary to public policy. The State has sound public policy reasons for exercising that right. The maintenance of high professional standards, ethical requirements, and professional dignity, the need for a close professional-patient relationship, and the requirement of unfettered and unprejudiced professional judgment justify the State's conclusion that unqualified and unlicensed persons and corporations be prohibited from controlling the activities of the professional pharmacist.

It is anticipated that opponents of the contested North Dakota ownership statute will argue that by upholding the statute's constitutionality, this Court will cause economic losses to the chain drug stores. Of course, the short answer to this is that financial consequences do not determine the parameters of the exer-

cise of the State's police power. Surely, if this were a determining factor, a plethora of remedial legislation would fall. For example, many of the standards (42 U.S.C. § 1857f-1 *et seq.*) governing emissions of substances from automobile engines and many of the protections of the Federal Food, Drug and Cosmetic Act (21 U.S.C. § 301 *et seq.*) would fall if economics were the sole criterion. The expected *ad terrorem* arguments of the chains on the economic issue, we submit, are of little importance when compared with what North Dakota was entitled to find was the overriding public interest in divesting lay control from the profession of pharmacy.

CONCLUSION

For the reasons stated herein and in appellant's brief, the American Pharmaceutical Association and the National Association of Retail Druggists respectfully urge that the October 31, 1972 decision and order of the Supreme Court of North Dakota be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1176

NORTH DAKOTA STATE BOARD OF PHARMACY,
Petitioner,

vs.

SNYDER'S DRUG STORES, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA

PETITIONER'S BRIEF

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AUTHORITIES

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PETITIONER'S BRIEF

OPINIONS BELOW

The opinion of the Supreme Court of North Dakota is reported at 202 N. W. 2d 140, and is printed in the Petition for Writ of Certiorari on page 17. The judgment on remittitur of the District Court of North Dakota is printed in the Petition for Writ of Certiorari on page 36.

The order denying the petition for rehearing is printed in the Petition for Writ of Certiorari on page 34.

JURISDICTION

The decision of the Supreme Court of North Dakota, (Petition for Writ of Certiorari, page 32) was entered on October 31, 1972. A timely petition for rehearing was denied on November 29, 1972 (Petition for Writ of Certiorari on page 34), with notice thereof given to petitioner on December 4, 1972. (Petition for Writ of Certiorari, page 38.)

The jurisdiction of the Court is invoked under Title 28, United States Code Annotated, Section 1257.

STATUTE AND CONSTITUTIONAL PROVISION INVOLVED

Section 43-15-35 (5) North Dakota Century Code:

Requirements for permit to operate pharmacy—The board shall issue a permit to operate a pharmacy, or a renewal permit, upon satisfactory proof that:

5. The applicant for such permit is qualified to conduct the pharmacy, and is a registered pharmacist in good standing or is a partnership, each active member of which is a registered pharmacist in good standing, or a corporation or association, the majority stock in which is owned by registered pharmacists in good standing, actively and regularly employed in and responsible for the management, supervision, and operation of such pharmacy; and

The provision of subsection 5 of this section shall not apply to the holder of a permit on July 1, 1963, if otherwise qualified to conduct the pharmacy, provided that any such permit holder who shall discontinue operations under such permit or fail to renew such permit upon expiration shall not thereafter be exempt from

the provisions of such subsection as to such discontinued or lapsed permit. The provisions of subsection 5 of this section shall not apply to hospital pharmacies furnishing service only to patients in such hospital.

The applicable Federal constitutional provision appears in Section 1 of the Fourteenth Amendment:

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law;"

QUESTIONS PRESENTED

1. Does Section 43-15-35 (5), North Dakota Century Code, violate the due process clause of Section 1 of the Fourteenth Amendment of the United States Constitution?

2. Did the North Dakota Supreme Court err in being bound by and following the decision of the United States Supreme Court in *Liggett Co.* v. *Baldridge*, 278 U.S. 105 (1928)?

3. Should the *Liggett Co.* v. *Baldridge* decision and the decision of the North Dakota Supreme Court in this case be reversed or modified?

STATEMENT

This was an appeal to the Supreme Court of North Dakota from a State District Court decision reversing an administrative agency decision of the North Dakota State Board of Pharmacy, which denied a pharmacy permit to Snyder's Drug Stores, Inc., because it did not comply with the stock ownership requirements of Section 43-15-35 (5) of the North Dakota Century Code.

The application for a pharmacy permit indicated that all of the common stock of Snyder's Drug Stores, Inc., was owned by Red Owl Stores; and that it was not known if any shareholders of Red Owl Stores are or were pharmacists registered and in good standing in the State of North Dakota.

Section 43-15-35 (5) of the North Dakota Century Code requires that the majority of the corporate stock of a corporate applicant for a pharmacy permit be owned by registered pharmacists in good standing, actively and regularly employed in and responsible for the management, supervision, and operation of the pharmacy.

Since the application for a pharmacy permit did not comply with the requirements of Section 43-15-35 (5) of the North Dakota Century Code, the State Pharmacy Board denied the application. The constitutionality of Section 43-15-35 (5) was not before the State Pharmacy Board and therefore no evidence was presented on this question.

An appeal was taken by the respondent to the State District Court, and the question as to the constitutionality of Section 43-15-35 (5) was raised on appeal. The respondent, Snyder's Drug Stores, Inc., then brought a motion for summary judgment, which was granted by the District Court. The State Pharmacy Board, therefore, did not have an opportunity to present evidence relating Section 43-15-35 (5) to the public health, safety, and welfare.

The State Pharmacy Board then appealed the District Court decision to the Supreme Court of North Dakota.

The Supreme Court of North Dakota held that it was bound by the decision of the United States Supreme Court in *Liggett Co.* v. *Baldridge*, 278 U.S. 105, 49 S. Ct. 57, 73 L. Ed. 204 (1928), wherein a Pennsylvania 100% pharmacist ownership law was declared unconstitutional, and see-

ing insufficient basis for distinguishing that decision from the instant case, it sustained the trial court's conclusion that Section 43-15-35 (5) of the North Dakota Century Code violates the due process clause of Section 1 of the Fourteenth Amendment to the United States Constitution.

SUMMARY OF ARGUMENT

The argument of the petitioner can be summarized as follows:

(1) That there has been a change in the doctrine of the United States Supreme Court since the 1928 *Liggett* v. *Baldridge* decision; and the Supreme Court now does not judge the wisdom, need, merits, or reasonableness of state laws in determining whether a state law meets the requirements of the Fourteenth Amendment to the United States Constitution.

(2) That the United States Supreme Court and various state supreme courts have recognized this change of doctrine, and the state court decisions have noted that the *Liggett* v. *Baldridge* decision has been seriously limited if not completely undermined.

(3) That the Supreme Court of North Dakota did err in relying on *Liggett* v. *Baldridge* and being bound thereby.

(4) That the North Dakota statute in question is properly related to the public health, welfare, and safety.

(5) That the ownership or control restriction on non-professionals is constitutional in other professions such as dentistry and optometry and the same should be true in the profession of pharmacy.

ARGUMENT

Change in Doctrine of United States Supreme Court

There has been a change in philosophy and attitude of the United States Supreme Court since the *Liggett* v. *Baldridge*, 278 U.S. 105 (1928) decision upon which the North Dakota Supreme Court based its decision.

As originally construed, the due process clause of the Fourteenth Amendment was viewed as a guaranty of procedural protection rather than bringing to the test of the decision of the United States Supreme Court, the "merits" of the legislation. *Davidson* v. *New Orleans*, 97 U.S. 97, 103-104 (1878); *Slaughterhouse Cases*, 16 Wall. 36, 80-81 (1873). Initially, the court refused to reject legislation on constitutional grounds, on other than procedural aspects under the Fourteenth Amendment. Best exemplifying this evaluation is an 1877 case wherein the court upheld a rate-fixing statute of Illinois, recognizing the possibility of abuse, but stated that "for protection against abuses by legislatures, the people must resort to the polls, not to the courts." It also asserted, "For our purposes we must assume that, if a state of facts exist that justify such legislation, it actually did exist when the statute now under consideration was passed." *Munn* v. *Illinois*, 94 U.S. 113, 132, 134 (1877).

About a decade later, the court departed from this emphasis on the procedural aspect and considered the law itself. This attitude of the court found expression in many cases holding state and federal statutes unconstitutional. Examples of such decisions: *Lochner* v. *New York*, 198 U.S. 45 (1905); *Coppage* v. *Kansas*, 236 U.S. 1 (1915); *Adkins* v. *Children's Hospital*, 261 U.S. 525 (1923); *Burns Baking Co.* v. *Bryan*, 264 U.S. 504 (1924). This philosophy prevailed when the *Liggett Co.* case was decided by the court in 1928.

Current evidence of the change in emphasis and philosophy is found in *Ferguson* v. *Skrupa*, a case decided in 1963. The court sustained the constitutionality of a state law prohibiting other than lawyers from engaging in the business of debt adjusting or debt-pooling. The language of the court indicates its attitude:

"Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation.

"There was a time when the Due Process Clause was used by this court to strike down laws which were thought unreasonable; that is unwise or incompatible with some particular social or economic philosophy. . . This intrusion by the judiciary into the realm of legislative value judgments was strongly objected to at the time, particularly by Mr. Justice Holmes and Mr. Justice Brandeis.

"The doctrine that prevailed in the *Lochner, Coppage, Adkins, Burns,* and like cases—that due process authorizes courts to hold law unconstitutional—when they believe the legislature has acted unwisely—has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.

"It is now settled that States have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law.

"We conclude that the Kansas legislature was free to decide for itself that legislation was needed to deal with the business of debt adjusting.

"We refuse to sit as a 'super-legislature' to weigh the wisdom of legislation . . . and we emphatically refuse to go back to the time when courts used the Due Process Clause to strike down state laws, regulatory of business and industrial conditions, because they are unwise, improvident, or out of harmony with a particular school of thought. . . ."

Ferguson v. *Skrupa*, 372 U.S. 726, 729, 730, 731, 732, 10 L. Ed. 2d 93, 96, 97, 98 (1963). See also *Joseph E. Seagram & Sons* v. *Hostetter*, 384 U.S. 35, 86 S. Ct. 1254, 16 L. Ed. 2d 336, *Boddie* v. *Connecticut*, 401 U.S. 371, 384, 28 L. Ed. 2d 113, 123 (separate concurring opinion of Justice Douglas).

The decision in *Daniel* v. *Family Secur. L. Ins. Co.*, (1949) 336 U.S. 220, 93 L. Ed. 632, 69 S. Ct. 550, illustrates the unanimous view of the Supreme Court, announced in *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.*, (1949) 335 U.S. 525, 536, 537, 93 L. Ed. 212, 221, 227, 69 S. Ct. 251, 6 A.L.R. 2d 473, that the due process clause is no longer to be so broadly construed that the Congress and state legislatures are put in a strait jacket when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare, the Court returning closer and closer to the earlier constitutional principle that states have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific Federal constitutional prohibition, or of some valid Federal law.

The *Daniel* case also stated that the court "cannot undertake a search for motive in testing constitutionality," and that the desirability of legislation is not a matter for the courts, but for a responsive legislature. (336 U.S. 224)

In *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 487-488 (1955), Justice Douglas stated:

> "The (state) . . . law may enact a needless, wasteful requirement in many cases. But it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement. . . . The law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.
>
> "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.
>
> "For protection against abuses by legislatures, the people must resort to the polls, not to the courts."

The United States Supreme Court does not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. *Griswold* v. *Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510; *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U.S. 421, 72 S. Ct. 405, 96 L. Ed. 469.

As stated in *Dandridge* v. *Williams*, 397 U.S. 471, 484, 25 L. Ed. 2d 491, 501, 90 S. Ct. 1153:

> "For this court to approve the invalidation of state economic or social regulation as 'overreaching' would be far too reminiscent of an era when the court thought the Fourteenth Amendment gave it power to strike down state laws 'because they may be unwise, improvident, or out of harmony with a particular school of thought;' "

citing *Williamson* v. *Lee Optical* and *Ferguson* v. *Skrupa*:

> "If laws are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary or discriminatory, the requirements of due process are satisfied. With the wisdom of the policy, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal."

Nebbia v. *New York*, 291 U.S. 502, 531 (1934). See also *Olsen* v. *Nebraska*, 313 U.S. 236, 241 (1941); *Daniel* v. *Family Ins. Co.*, 336 U.S. 220, 222-224 (1949).

We submit that if the *Liggett* v. *Baldridge* case were before the Supreme Court now, that under the doctrine now applied in regard to the due process clause, a different result would be reached.

If the North Dakota legislature determined that registered pharmacists should control the management and operation of pharmacies to protect the public health, safety, and welfare, we do not believe that under the present doctrine of the Supreme Court that the decision of the state legislature would be held to be unwise, unreasonable, or unconstitutional.

Reliance by North Dakota Supreme Court on Liggett v. Baldridge Is Not Proper

The North Dakota Supreme Court relied entirely on the United States Supreme Court case of *Liggett Co.* v. *Baldridge*, 278 U.S. 105, 49 S. Ct. 57, 73 L. Ed. 204 (1928) and stated at page 30 of the Petition for Writ of Certiorari, and at 202 N. W. 2d, as follows;

> "Being bound by the decision of the United States Supreme Court in *Baldridge*, and seeing insufficient basis for distinguishing that decision from the instant case, we sustain the trial court's conclusion that Section 43-15-35 (5), N.D.C.C., violates the due process clause of Section 1 of the Fourteenth Amendment to the United States Constitution."

The *Liggett* case involved a Pennsylvania statute which required that registered pharmacists own 100% of the stock of any corporation owning a drug store or having a pharmacy permit.

The North Dakota statute under consideration here requires that only a majority of the stock be owned by registered pharmacists, and also requires that the pharmacist owner be actively engaged in and responsible for the operation, management and supervision of the pharmacy. The North Dakota statute is concerned with the control of the management supervision, and operation of the pharmacy as opposed to mere ownership.

The basic issue under the North Dakota statute is not one of ownership, but rather of control of the supervision and management of the pharmacy.

The *Liggett* v. *Baldridge* United States Supreme Court case the North Dakota Supreme Court felt bound by has been discounted, seriously limited, perhaps completely un-

dermined, and not followed by courts in California, Maryland, Michigan, and by the United States Supreme Court itself.

The California case of *Magan Medical Clinic* v. *California State Board of Medical Examiners*, 57 Cal. Rptr. 256, at page 263, stated that there can be no doubt that the rule (in *Liggett* v. *Baldridge*) is now different, quoting with approval from the Maryland case of *Brooks* v. *State Board of Funeral Dir. & Embalm.*, 195 A. 2d 728, 735 (1963), where it states: "It (the *Liggett* case) has been seriously limited, if not completely undermined."

In the Maryland case of *Brooks* v. *State Board of Funeral Dir. & Embalm.*, 195 A. 2d 728 at page 735, it states as follows:

> "The Liggett case has never been expressly overruled, but it has been seriously limited, if not completely undermined. See *Daniel* v. *Family Security Life Ins. Co.*, 336 U.S. 220, 69 S. Ct. 550, 93 L. Ed. 632, in which the Supreme Court sustained a state statute forbidding undertakers to serve as agents for life insurance companies. In commenting on *Liggett*, the United States Supreme Court said (336 U.S. at pages 224-225, 69 S. Ct. at page 553, 93 L. Ed. 632):
>
> > 'We cannot say that South Carolina is not entitled to call the funeral insurance business an evil. Nor can we say that the statute has no relation to the elimination of those evils. There our inquiry must stop. This rationale did not find expression in *Liggett Co.* v. *Baldridge*, 278 U.S. 105, 49 S. Ct. 57, 73 L. Ed. 204, on which respondents rely. According to the majority in *Liggett*, "a state cannot" under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations

or impose unreasonable and unnecessary restrictions upon them.'

"278 U.S. at page 113, 49 S. Ct. at page 59, 73 L. Ed. 204. But a pronounced shift of emphasis since the *Liggett* case has deprived the words 'unreasonable' and 'arbitrary' of the content for which respondents contend. See *Lincoln Federal Labor Union No. 19129, A. F. of L.* v. *Northwestern Iron and Metal Co.*, 335 U.S. 525, 69 S. Ct. 251, 93 L. Ed 212, where the cases are reviewed."

The *Brooks* case at page 735 also stated that "the sweep of the *Liggett* case was already limited by the action of the Supreme Court in *Markmann Funeral Home, Inc.* v. *Ryan*, 300 U.S. 639, 57 S. Ct. 510, 81 L. Ed. 855."

It should be noted that the Supreme Court of Michigan, after many hearings and after extensive argument before their Supreme Court on three different occasions, in the case of *Superx Drugs Corp.* v. *Michigan Board of Pharmacy*, reported at 146 N. W. 2d 1, 134 N. W. 2d 678, 132 N. W. 2d 328, and 125 N. W. 2d 13, has not by a majority decision of its Court, held a 25% ownership requirement by a registered pharmacist to be an unconstitutional requirement, and apparently did not feel bound by the *Liggett* v. *Baldridge* case.

We submit that *Liggett* v. *Baldridge* has been discounted and seriously limited and was not proper authority for the North Dakota Supreme Court to base its decision on.

Statute Related to Public Health, Safety, and Welfare

Since the operation of a pharmacy embraces the acquisition, compounding and dispensing of dangerous drugs, poisons and narcotics, the relationship of such operation to public health is clearly indisputable.

The question of whether the enactment of Section 43-15-35 (5) of the North Dakota Century Code was a proper exercise of the police power, and related to the public health, welfare, and safety, was not properly before the North Dakota Supreme Court. This issue was not before the administrative agency, and upon appeal to the State District Court the case was decided upon a motion for summary judgment without the opportunity to present evidence on the relationship of the statute to the public health, safety and welfare.

We would submit the following as some of the reasons this ownership and control restriction is related to the public health, safety and welfare:

(1) The professional and ethical standards of pharmacy demand the pharmacists's concern for the quantity and quality of stock and equipment. A drug which has deteriorated because of improper storage facilities can be a detriment to public welfare. The drug not in stock poses a threat to the individual who needs it now. The owner of a pharmacy or those in control of a pharmacy are very influential in determining what, when and where stock and equipment are purchased, and these decisions could be detrimental to the public health and welfare.

Since the hired pharmacist is dependent upon his supervisors to furnish the tools and ingredients to

assure the highest measure of quality and pharmaceutical service to the public, the presence of trained, licensed pharmacists in supervisory and managerial positions, with a full sense of accountability as a professional man, will further assure the public of proper pharmaceutical service in the best interests of public health and safety.

(2) One of the problems of adequate public protection in pharmacy operation is the placement of responsibility for improper action. The unlicensed owner or corporation official will disclaim responsibility by claiming the fault belongs to an incompetent pharmacist he hired, whose inadequacy he was incapable of detecting. The hired pharmacist will insist that he was compelled, out of considerations of personal insecurity, to yield to unlawful directions of untrained superiors. When licensed pharmacists are involved in the ownership or management of pharmacies, accountability for non-observance of lawful requirements would be definitive. Section 43-15-35 (5) NDCC would ease the task of enforcement agencies in the detection, elimination and accountability for unethical conduct. In fact, the greater accountability recognized by licensed practitioners would be an effective deterrent to improper practices which expose the public to serious injury.

Essentially, pharmacists find themselves in a somewhat unique position in comparison with other professions in that, while they are rendering a specialized professional service requiring the highest degree of skill, knowledge and integrity, they also are involved in a commercial venture, whose area has been invaded by non-pro-

fessionals whose only aim is to profit from the profession of pharmacy. The operation of pharmacies by non-licensed individuals has converted the policy of the pharmacy in some cases to a commercial enterprise, minimizing the importance of the standards of the profession and the protection of the public. These pressures tend to demoralize a professional undertaking by subjugating the professional standards to destructive commercial influences, and the ultimate detrimental effect on the health, welfare, and safety of the public caused by lack of proper safeguards and standards so closely associated with the maintenance of the standards of the profession of pharmacy.

With the advance of modern discoveries of miracle drugs, and the drug problems present in the United States, it is now more than ever important that the practice of pharmacy be free from commercialism; and that the purchase and sale of such drugs to the public be controlled, managed and initiated by owners, or those in control of the operation, who are themselves registered and qualified; and who will take individual pride in their profession as pharmacists, rather than in the making of extra profits such business may afford a non-professional owner of such pharmacy.

(3) The dignity of a profession and the morale and proficiency of those licensed to engage therein is enhanced by prohibiting the practitioner from subordinating himself to the direction of untrained supervisors. There are comparable statutory requirements pertaining to the practice of

other licensed professions, such as accounting, architecture, law, engineering, and the health field of medicine, dentistry, etc.

(4) It is recognized that not all licensed practitioners are possessed of the same measure of proficiency in their profession. Lay management, being untrained, cannot detect such deficiencies, either in the employment of licensed pharmacists or in the actual practice of the profession. Section 43-15-35 (5) NDCC will tend to assure a higher standard of competence in pharmacist-employees, it being recognized that the non-professional owner of necessity must hire licensed pharmacists to carry on the practice of pharmacy. The public is entitled to and is dependent on such protection to the extent that licensed pharmacists have the requisite skill and competence. Therefore, the requirement that the owner, partners, or corporate officers and directors responsible for and supervising the pharmacy be themselves licensed pharmacists, would assure the public of increased protection through the insistence of greater professional capabilities on the part of managerial supervisors. The legislature is taking an additional precaution to prevent abuse of the public safety.

(5) The divorce between professional knowledge and attainment and lay managerial control is an evil, and the public should not be exposed to such evil. Where control and management are vested in laymen unacquainted with pharmaceutical service, and who are untrained and unlicensed, the risk is evident that social accountability will be subordinated to the profit motive with dire con-

sequences to the profession of pharmacy. The purpose of this legislation is to enhance protection afforded the public by balancing the profit motive and the professional obligations of service and responsibility.

(6) The pharmacy of a drug store was never intended to be a mere device for developing customer traffic for a business enterprise. A pharmacy was intended to be more than just a prescription laboratory within a jungle of commercial departments. The term "pharmacy" was intended to identify a particular type of establishment within which a health profession is practiced. Under some present laws which permit purely commercial interests to wholly own or control pharmacies, the policies, practices and conduct of pharmacies are frequently unduly influenced by such commercial interests. The basic truth is the person who holds the purse strings is the person who controls policy.

(7) Restricting physician-owned and controlled pharmacies where there could be a serious conflict of interest. See *Magan Medical Clinic* v. *California State Board of Medical Examiners*, 57 Cal. Rptr. 256. At page 260 of the *Magan* opinion in footnote 1, some of the testimony offered regarding the evils of physician ownership of pharmacies is set forth. See also *Hearings on Physician Ownership in Pharmacies and Drug Companies before a Subcommittee of the Senate Committee on the Judiciary*, 88th Cong., 2d Sess. 175-77 (1964). See also *Hart Bill*, S. 2568, 89th Cong., 1st Sess. (1965).

In the *Liggett* case, the lower Federal District Court held that the statute in question was constitutional, and stated as follows:

"We are unable to say that there is not a substantial relation of ownership to the public interest. The medicines must be in the store before they can be dispensed to those who come to the store for the help which medicines can afford them. What is there is dictated, not by the judgment of the pharmacist, who hands it out to customers, but by those who have the financial control of the business. It may be the Legislature's thought that a corporate owner, in purchasing drugs, might give a greater regard to the price than to the quality; and if such was the thought of the Legislature, can this Court say it was without a valid connection with the public interest, and so unreasonable as to be unlawful?

"There enters into every business the two motives of a wish for profit and a sense of duty obligation towards those with whom the management deals. When these are joined, the latter operates to some extent; the moment they are separated, the former is in sole control.

"Because of our inability to make the finding that the instant act of the assembly has no substantial relation to the public interest, we cannot hold it to be unconstitutional. What opinion may be entertained of the wisdom of much of the legislation of this general character, and of the motives of those who have prompted it, the courts are not called upon to express."

Liggett Co. v. *Baldridge*, 22 F. 2d 993, at page 996.

In *Liggett Co.* v. *Baldridge*, 278 U.S. 105, Mr. Justice Holmes in his dissent stated:

> "A standing criticism of the use of corporations in business is that it causes such business to be owned by people who do not know anything about it. Argument has not been supposed to be necessary in order to show that the divorce between the power of control and knowledge is an evil. The selling of drugs and poisons calls for knowledge in a high degree, and Pennsylvania after enacting a series of other safeguards has provided that in that matter the divorce shall not be allowed. Of course, notwithstanding the requirement that in corporations hereafter formed all the stockholders shall be licensed pharmacists, it still would be possible for a stockholder to content himself with drawing dividends and to take no hand in the company's affairs. But obviously he would be more likely to observe the business with an intelligent eye than a casual investor who looked only to the standing of the stock in the market. The Constitution does not make it a condition of preventive legislation that it should work a perfect cure. It is enough if the questioned act has a manifest tendency to cure or at least to make the evil less. I think, however, that the police power as that term has been defined and explained clearly extends to a law like this, whatever I may think of its wisdom, and that the degree should be affirmed." (*Note*: The dissent was joined in by Mr. Justice Brandeis.)

In the Michigan case of *Superx Drugs Corp.* v. *Michigan Board of Pharmacy*, 146 N. W. 2d 1 at page 4, Justice Deltmers stated:

"There is testimony of eminent pharmacologists, teachers and practitioners in the field, that in their opinion there is a reasonable relationship between the statute's stock ownership requirements and public health and safety. They also testified as to their reasons for their opinions. It is true that there also is testimony in the record to the contrary. As this Court said, however, in *Grocers Dairy Company* v. *Department of Agriculture Director*, 138 N. W. 2d 767:

> The presumption of the constitutionality of a statute favors validity, and, if the relation between the statute and the public welfare is debatable, the legislative judgment must be accepted."

We submit that the North Dakota pharmacist control statute is properly related to the public health, safety and welfare, and is a proper exercise of the police power.

Prohibition on Physician Ownership of Pharmacies

One of the reasons for the enactment of Section 43-15-35 (5) of the North Dakota Century Code was to prevent physician ownership of pharmacies.

California, Maryland and Pennsylvania have statutes relating to physician ownership of pharmacies.

The California enactment prohibits the pharmacy board from issuing new pharmacy permits to physicians and requires all physicians to rid themselves of any "membership, proprietary interest, or co-ownership" by June 1, 1967. Cal. Bus. & Prof. Code, Sec. 654. See *Magan Medical Clinic* v. *California State Board of Medical Examiners*, 57 Cal. Rptr. 256, wherein the California statute was upheld as constitutional.

Both the Pennsylvania and the Maryland regulations in essence empower the state boards of pharmacy to suspend or revoke the license of a pharmacist for association as an employee, co-owner, or partner in any pharmacy in which a medical practitioner has an interest, and declare such association to be unprofessional conduct. Pa. Stat. Ann., Tit. 63, Sec. 390-5 (9) (xii) (Supp. 1964); Md. Ann. Code Art. 43, Sec. 266A (c) (4) (iii) (Supp. 1964).

The California, Maryland and Pennsylvania provisions can only be interpreted as an implicit recognition of the evils inherent in the physician-owned pharmacy, and represent an attempt on the part of those states to remedy the problem *Physician Ownership of Pharmacies,* 141 Notre Dame Lawyer 49, 62 (1965).

North Dakota, through the statute in question, has accomplished the same objective. The courts should not be allowed to say that this law is unconstitutional, because there is a better or different way this objective could have been accomplished.

Should the Profession of Pharmacy Be Treated Differently from Other Professions?

On the authority of statutes and court decisions, pharmacy has been declared to be a profession. California-West's Ann. Bus. & Prof. Code, Sec. 4046; Louisiana—LSA-R.S. 37, 1222; Nevada—Nev. Rev. Stats., Sec. 639.213; Pennsylvania—63 P. S. Sec. 390-2 (11); *Lee* v. *Goddy,* 183 So. 4, 6 (Fla. 1938); *Sashihara* v. *State Bd. of Pharmacy,* 46 P. 2d 804, 805 (Calif. 1935).

In *Liggett,* however, the Supreme Court viewed the practice of pharmacy as more of a trade or occupation, rather than a profession. See *Physician Ownership in Pharmacies,* 141 Notre Dame Lawyer 49, 60.

Similar ownership or control requirements have been sustained in other professions such as optometry and dentistry. Why should the profession of pharmacy be treated any differently?

In *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 99 L. Ed. 563, 75 S. Ct. 461 (1954), the United States Supreme Court upheld the validity of a state law which prohibited unregistered optometrists from becoming employees of unregistered individuals or corporations. Stress in such cases has been placed by the courts on the necessity for unfettered professional activity in dealing with the needs of a patient.

A Washington statute held to be a reasonable exercise of the police power in *State* v. *Boren*, 219 P. 2d 566 (1950) appeal dismissed 340 U.S. 881 (1950) prohibited the practice of dentistry without a license; and provided that a person practices dentistry who owns, maintains or operates an office for the practice of dentistry. The *State* v. *Boren* case overruled *State* v. *Brown*, 79 P. 635 (Wash. 1905) which concluded that the health, moral, or physical welfare of the public is not endangered by the ownership and management of a dental office, so long as the actual dental work is done by those qualified and licensed by law.

In overruling *State* v. *Brown*, the Washington court declared in the *Boren* case, that it agreed with the general statement made in the *Brown* case that "to own and manage property is a natural right," but that there was a clear distinction between the right of the state to interfere with the owning and managing of property as such, and its right under its police power to protect the health of its people. The care and treatment of the teeth requires a personal relationship between dentist and patient, and the services of a trained expert. Dentistry is not a

business or a commercial transaction, but is a profession, the regulation of which is a duty of the state. The state has decided that the statutory regulation considered here is necessary to protect the health of the people. Clearly, such a regulation is a reasonable exercise of its police power.

State ex rel. Standard Optical Co. v. *Superior Court*, 135 P. 2d 839 (Wash. 1943), was a quo warranto proceeding charging the defendant corporation with unlawfully practicing optometry. The corporation operated a store which was in the sole charge of a licensed optometrist employed and paid by the corporation. The corporation exercised no control over the optometrists' professional judgment. The court, in holding that the course of business followed by the corporation constituted the unlawful practice of optometry, stated that if such a course were sanctioned, corporations might practice law, medicine, dentistry, or any other profession by the simple expedient of employing licensed agents. If this were permitted, professional standards could be destroyed, and professions requiring special training would be commercialized to the public detriment.

In *State* v. *Williams*, 5 N. E. 2d 961 (Ind. 1937), a statute declaring that one who owned, operated, managed or conducted a dental office was engaged in the practice of dentistry, was held to be within the police power of the state. The court declared that if a person or association of persons unqualified to become licensed as dentists can own, manage and operate a dental office with a licensed dentist in charge, that all the statutes regulating the practice of dentistry would be of no effect. The standards and ethics of the dental office, the class of workmanship and the price would be regulated by the owner. If the owner could select and rent the office and employ the licensed dentist to do the actual work, he

would be doing a dental business, and would be doing indirectly what he could not do directly.

In a California case, *Parker* v. *Board of Dental Examiners,* 14 P. 2d 67 (1932), involving similar regulations, the appellant contended there was a distinction between the practice of dentistry which the statute undertook to regulate and the purely business side of the practice. The court held that to make such a distinction was impractical. To hold otherwise would allow the proprietor of the business to be guilty of such misconduct as to violate standards which a licensed dentist is required to respect and allow him immunity from regulatory supervision. His employee, the licensed dentist, would also be immune upon the grounds that he was a mere employee, and not responsible for his employer's acts. The right of a person merely to own a dental office not being involved, the question was whether the thing owned was used for an intended purpose by a person lawfully licensed to so use it. An unlicensed owner would possibly have less regard for the employee's skill than would a licensed owner charged with the obligation he assumes with respect to the standards of his profession.

In *Messner* v. *Board of Dental Examiners,* 262 P. 58, 60 (1927), the court stated:

> "The power to hire and discharge and to fix the compensation of an employee necessarily implies the power to control his work."

The state regulation of the practice of optometry is discussed in *Physician Ownership of Pharmacies,* 141 Notre Dame Lawyer 49, 63, wherein it is stated as follows:

> "The relationship between an optometrist and the optician on the one hand, and the physician and the pharmacist on the other hand, is quite similar. Both

the optometrist and the physician prescribe devices or medicines as treatment for the ills which they diagnose. These devices or medicines are ordinarily furnished by third parties.

There is a split of opinion among the states as to whether a corporation or a non-optometrist may be allowed to hire an optometrist and sell his services to the public. See cases collected in Annot., 128 A.L.R. 585 (1940) . . . . Many of these states follow the *Liggett* rationale in holding that the identity of the employer of an optometrist can have no relation to the public health, safety, and welfare. In other states, statutes prohibiting a registered optometrist from becoming the servant of unregistered individuals or corporations have been held constitutional. *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 491 (1954); *Kay Jewelry* v. *Board of Registration in Optometry*, 27 N. E. 2d 1 (Mass. 1940); *McMurdo* v. *Getter*, 10 N. E. 2d 139 (Mass. 1937). Courts in these states have held that such an arrangement permits the unlicensed party to exercise control over the professional activities of the licensed party, and that the separation of control and professional knowledge is an evil which is detrimental to the public interest. *McMurdo* v. *Getter*, supra at 142; *Ezell* v. *Ritholz*, 198 S. E. 419 (S. C. 1938).

As the Supreme Court of South Carolina said in *Ezell* v. *Ritholz*, 198 S. E. 419, 424 (S. C. 1938):

> The ethics of any profession is based upon personal or individual responsibility. One who practices a profession is responsible directly to his patient or his client. Hence, he cannot properly act in the practice of his vocation as an agent of a corporation or business partnership whose interests

in the very nature of the case are commercial in character.

In holding that the state of Pennsylvania could prohibit a corporation from practicing optometry through hired licensed optometrists, the Supreme Court of Pennsylvania, in *Neill* v. *Gimbel Bros.*, 199 Atl. 178, 182 (1938), stated:

> One who practices a profession is apt to have less regard for professional ethics and to be less amenable to regulations for their enforcement when he has no contractual obligations to the client, does not fix or receive the fees, and is under the control of an employer whose commercial interest is in the volume of sales of merchandise affected by the prescriptions of the employee-practitioner.

In short, these courts have realized that when a professional practitioner such as an optometrist is subjected to the control of an unprofessional employer, and is dependent upon him for compensation, it is possible that 'the welfare of the patient would not be the sole criterion applied by the optometrist in rendering services to him.' *Lieberman* v. *Conn. St. Bd. of Examiners in Optometry*, 34 A. 2d 213 (Conn. 1943)."

Under the Professional Corporation Act of the State of North Dakota, Section 10-31-07, a professional corporation may issue the shares of its capital stock only to persons who are duly licensed to render the same specific professional services as those for which the corporation was organized. This act requires one hundred per cent ownership, as opposed to the pharmacy requirement of majority ownership. If such a requirement is constitutional for a professional corporation, why should it be any different for a corporation operating a pharmacy?

Portions of the above authorities are cited in a North Dakota Law Review note at 39 North Dakota Law Review 447, entitled, "Is the North Dakota Statutory Requirement that Pharmacies Be Owned by Registered Pharmacists a Valid Exercise of Police Power?" wherein it is submitted that the effect a non-pharmacist owner can have in the practice of pharmacy would be detrimental to the public health and welfare, and is extensive enough to require regulation.

If the ownership or control restriction is constitutional and determined to be related to the public health, welfare, and safety in other professions, we submit that the same is true in respect to the profession of pharmacy.

CONCLUSION

We ask that the United States Supreme Court in this case reverse or modify the *Liggett* v. *Baldridge* decision and the decision of the North Dakota Supreme Court to conform with later decisions and the prevailing doctrine of the United States Supreme Court on this constitutional question.

Respectfully submitted,

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June 13, 1973

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 72-1176

North Dakota State Board of Pharmacy,
Petitioner,

vs.

Snyder's Drug Stores, Inc.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA

BRIEF FOR RESPONDENT IN OPPOSITION

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March 20, 1973

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OPINION BELOW

As indicated by the petitioner, the opinion of the Supreme Court of North Dakota is reported at 202 N.W.2d 140.

JURISDICTION

Respondent does not question the jurisdiction as set forth in the petition.

QUESTION PRESENTED

Properly stated, the question presented in the petition is whether the North Dakota Supreme Court correctly held that, on the record before it, Section 43-15-35(5) of the North Dakota Century Code violates the Due Process Clause of Section 1 of the Fourteenth Amendment of the United States Constitution because the statutory requirement limiting ownership of pharmacies to pharmacists or to corporations controlled by pharmacists does not bear a real and substantial relationship to the public health, safety and welfare.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 43-15-35(5) of the North Dakota Century Code is set out in the petition.

The applicable federal constitutional provision appears in Section 1 of the Fourteenth Amendment:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law;"

STATEMENT OF THE CASE

Although substantially correct, the petitioner's statement of the case is not sufficiently complete to present properly the procedural background for the decision by the North Dakota Supreme Court.

In January of 1971 the respondent, Snyder's Drug Stores, Inc., had applied to the North Dakota State Board of Pharmacy for a permit to operate a pharmacy at the Red Owl Family Center in Bismarck, North Dakota. The application indicated that if the permit was granted, the pharmacy would be "conducted in full compliance with. . . existing laws and regulations of the Board of Pharmacy," and would in other respects meet all of the requirements of Section 43-15-35 for the issuance of a permit with the exception of the ownership requirement in Subsection (5).

The permit was subsequently denied by the State Board on March 22, 1971, both because Snyder's failed to meet the ownership requirements of Section 43-15-35(5) and because the proposed pharmacy would, allegedly, fail to meet certain structural and safety standards imposed by the State Board.

On April 12, 1971, Snyder's filed its notice of appeal from the denial. The company alleged that Section 43-15-35(5) was unconstitutional and that there was no evidence to support the State Board's findings with respect to the adequacy of the proposed structural and safety provisions.

Six months later, on November 16, 1971, Snyder's Drug Stores brought a motion for summary judgment, with accompanying affidavits, and scheduled a hearing for December 3, 1971. Since no countering affidavits were ever submitted by the State Board, the record before the trial court consisted of Snyder's application, its supporting affidavits and the federal and state rules and regulations governing the distribution and sale of drugs in North Dakota. Following the hearing on the summary judgment motion, the District Court held in favor of Snyder's Drug Stores on both the constitutional issue and the issues concerning the adequacy and legality of the Board's findings in the other areas.

On April 4, 1972, the State Board filed its notice of appeal from the judgment granting Snyder's motion for summary judgment. In its decision on the appeal, the North Dakota Supreme Court upheld the District Court's holding with respect to the unconstitutionality of Section 43-15-35(5), but remanded the case to the State Board for an additional administrative hearing with respect to the adequacy of the layout and safety provisions in the proposed pharmacy. **Snyder's Drug Stores, Inc., v. North Dakota State Board of Pharmacy**, 202 N.W. 2d 140, 145 (N.D. 1972).

ARGUMENT

In its petition the State Board of Pharmacy does not argue that the North Dakota Supreme Court failed to follow applicable Supreme Court decisions. Rather the State Board asks this Court to overrule its decision in **Liggett Co. v. Baldrige**, 278 U.S. 105 (1928), which the North Dakota court had followed, and to hold that a state can limit the ownership of profit-making pharmacies to a privileged few individuals without even presenting some evidence tending to show that the restrictive legislation bears a real and substantial relationship to public health, safety or welfare. This position does not find support in the Constitution, the decisions of this Court or in the decisions of lower federal and state courts.

In **Liggett Co. v. Baldrige, supra**, a Pennsylvania statute requiring pharmacies to be owned by pharmacists or by corporations owned by pharmacists was found to be an unconstitutional imposition on rights guaranteed by the Fourteenth Amendment. Two aspects of the decision stand out and are still good law today.

The first is the Court's formulation of the applicable standard of judicial review. In attempting to sustain the statute, the State of Pennsylvania had argued that the legislation was a valid exercise of the state's police power. To sustain such a contention, the statute had to bear "a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare." 278 U.S. at 111-12. None of the Supreme Court decisions since 1928 have radically altered this formulation of the standard for reviewing legislation sought to be upheld under the state's police power, and the petitioner cites no such cases. The State Board admits as much since it does not assert that the

legislation is acceptable under a different Due Process standard, but rather argues on page 13 of its petition that the statute meets the **Liggett Company** test in that it "bears a real and substantial relation to the public health, safety, morals and general welfare." Moreover, such language is in accord with North Dakota decisions outlining due process requirements. See **Bob Rosen Water Conditioning Co. v. City of Bismarck**, 181 N.W. 2d 722, 724-25 (N.D. 1970), and **Fairmont Foods Co. v. Burgum**, 81 N.W. 2d 639, 646 (N.D. 1957). There is, then, no real argument about what the applicable standard of review is or should be.

The second aspect of the **Liggett Company** decision involves the state's obligation to produce at least some evidence to show the alleged rational connection between the legislation and a permissible public purpose when a suspect statute is challenged. In **Liggett Co. v. Baldrige**, this Court twice emphasized that the state had produced no evidence to support its position. Thus, this statement appears on page 113 of the opinion:

> "In the light of the various requirements of the Pennsylvania statutes, it is made clear, if it were otherwise doubtful, that mere stock ownership in a corporation, owning and operating a drug store, can have no real or substantial relation to the public health; and that the act in question creates an unreasonable and unnecessary restriction upon private business. **No facts are presented by the record, and, so far as appears, none were presented to the legislature which enacted the statute, that properly could give rise to a different conclusion.**" [emphasis added]

278 U.S. at 113. Later in the same paragraph the Court stated:

> "If detriment to the public health thereby [through the operation of chain drug stores] has resulted or is threatened, some evidence of it ought to be forthcoming. None has been produced, and, so far as we are informed, either by the record or outside of it, none exists."

278 U.S. at 114.

In other words, the minimal and sensible holding of Liggett Co. v. Baldrige is that when the constitutionality of a state statute is challenged and the challenger shows that the legislation apparently adds nothing to the protection of the public health, safety and welfare, but rather simply secures monopoly power to a privileged, limited number of individuals, the state at least has the obligation to come forward with some evidence showing or suggesting a rational basis for the legislation. If it fails to do so, the legislation cannot be upheld.

In this case, the petitioner failed to produce any evidence supporting its contention that a statute restricting the ownership of pharmacies to pharmacists or corporations controlled by pharmacists has some relation to the public health, safety and welfare. No affidavits or other documents were submitted to the District Court at or prior to the summary judgment hearing to establish a reasonable relationship between the legislation and the public health or even to indicate that such evidence might be forthcoming at trial. Such affidavits are required under Rule 56(e) of the North Dakota Rules of Civil Procedure, which prohibits an adverse party from resting "upon the mere allegations or denials of his pleading," and requires him to "set forth specific facts showing that there is a genuine issue for trial."

Snyder's Drug Stores, on the other hand, had shown through its affidavits and citations that a multitude of federal and state statutes and regulations already adequately controlled the manufacture, distribution, handling and sale of drugs, that its proposed pharmacy would be conducted in accordance with all valid rules and regulations of the State Board of Pharmacy, other than

the ownership requirement, and that the pharmacy would at all times be under the supervision and management of a registered pharmacist in good standing in North Dakota, who in turn would be supervised by another pharmacist. Such evidence established at least a prima facie case that the legislation had no real, substantial relationship to the public health, safety or welfare, and consequently, under the **Liggett Company** decision, the State Board had an obligation to produce some evidence in support of its position. Since the Board failed to produce any such evidence, it should not now be heard to complain about the decision rendered against it.

It is clear from the North Dakota Supreme Court's decision that its holding rested in part on the State Board's failure to produce any kind of evidence countering the respondent's proof that the ownership legislation added nothing to the valid regulation of the drug industry for the protection of the public health:

> "Having no assurance from the Board of Pharmacy that specific evidence lacking in **Baldrige** and so far lacking in the instant case could be supplied on a remand, notwithstanding the Board's request that this case be remanded to the trial court with instructions to remand to the Pharmacy Board for an evidentiary hearing on the constitutional issue, and because of the Board's failure to this date to produce such evidence, we hold that this request comes too late."

202 N.W.2d at 144.

As indicated, the petitioner cites no Supreme Court cases holding that **Liggett Co. v. Baldrige** is no longer applicable to legislation imposing restrictions on the ownership of pharmacies. The three state court decisions found by the petitioner also fail to support its position.

For example, **Magan Medical Clinic v. California State Board of Medical Examiners**, 57 Cal. Rptr. 256 (Cal. App. 1967), and

Brooks v. State Board of Funeral Directors and Embalmers, 195 A. 2d 728 (Md. App. 1963), involved legislation and factual situations different from that in the present case. In **Magan Medical Clinic, supra**, the contested California statute prohibited only doctors from owning pharmacies, obviously a much more limited prohibition than the North Dakota Statute; and the California law did permit doctors to own stock in corporations which operate pharmacies. 57 Cal. Rptr. at 265. In **Brooks v. State Board of Funeral Directors and Embalmers, supra**, the Maryland statute prohibited any corporation from operating an undertaking establishment. Thus, not only was a completely different kind of business involved, but also only a particular kind of ownership was prohibited. The statute did not attempt to secure monopoly power over a particular business for a limited group of individuals.

The Michigan case cited by the petitioner, **Superx Drugs Corp. v. Michigan Board of Pharmacy**, 146 N.W.2d 1 (Mich. 1966), has an appropriate factual situation, but hardly supports the petitioner's position. Of the seven judges on the Michigan Supreme Court, only one, (whose opinion oddly enough appears first in the printed decision) found it possible to uphold the Michigan State Board of Pharmacy's denial of a permit to a corporation failing to meet the Michigan ownership requirements. 146 N.W.2d at 1-5. Three judges failed to reach the constitutional questions because they felt the record established that the drug company came under a statutory exception. 146 N.W.2d at 5-10. The other four judges held, in two separate opinions, that the Michigan ownership restrictions violated the Due Process Clause. 146 N.W.2d at 10-19 and 19-23. The petitioner's conten-

tion on page 9 of its petition that the Michigan judges did not feel bound by the **Liggett Co. v. Baldrige** case, is thus simply not borne out by the opinions.

CONCLUSION

The decision in **Liggett Co. v. Baldrige** has not been undermined by recent pronouncements of the Supreme Court insofar as it applies to legislation restricting the ownership of pharmacies or insofar as it imposes on a state agency seeking to uphold restrictive legislation the obligation to produce at least some evidence tending to show a real and substantial relationship between the legislation and the public health, safety and welfare. Consequently, the North Dakota Supreme Court properly followed the decision and held, on the evidence before it, that the North Dakota legislation restricting the ownership of pharmacies to pharmacists failed to meet the constitutional requirements.

For the foregoing reasons the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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March 20, 1973

PROOF OF SERVICE – CERTIFICATE OF SERVICE – SERVICE BY MAIL

I, Philip B. Vogel, attorney for respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on March 20, 1973, I served a copy of the foregoing and attached Brief for Respondent in Opposition on the North Dakota State Board of Pharmacy, petitioner herein, by mailing three copies in a duly addressed envelope, with first class postage prepaid to Frederick E. Saefke, Jr., Counsel for Petitioner, 411 North Fourth Street, Post Office Box 1874, Bismarck, North Dakota 58501, and by mailing three additional copies with first class postage prepaid to Mr. A. William Lucas of Conmy, Conmy, Rosenberg & Lucas, Counsel of Record, 411 North Fourth Street, Post Office Box 1398, Bismarck, North Dakota 58501.

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1176

NORTH DAKOTA STATE BOARD OF PHARMACY,
Petitioner,

vs.

SNYDER'S DRUG STORES, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA

RESPONDENT'S BRIEF

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RESPONDENT'S BRIEF

QUESTION PRESENTED

Properly stated, the single question presented is whether the North Dakota District Court and North Dakota Supreme Court correctly held that, on the record before them, Section 43-15-35(5) of the North Dakota Century Code violates the due process clause of Section 1 of the Fourteenth Amendment to the United States Constitution because a statutory requirement limiting ownership of pharmacies to pharmacists or to corporations controlled by pharmacists does not bear a rational relationship to the public health, safety and welfare.

STATEMENT

Although substantially correct, the petitioner's statement of the case is not sufficiently complete to present properly the background for the decision by the North Dakota Supreme Court.

This lawsuit arises out of the five-year effort of the respondent, Snyder's Drug Stores, Inc., to establish a pharmacy in the Red Owl Family Center in Bismarck, North Dakota. The attempt commenced in May of 1968 when Family Center Drug Store, Inc. submitted to the North Dakota State Board of Pharmacy an application for a permit to operate a pharmacy. After a lengthy series of hearings, delays and appeals, the denial of the application by the State Board was upheld by the North Dakota Supreme Court on December 4, 1970, more than two and a half years after the initial application had been made. *Family Center Drug Store, Inc.* v. *North Dakota State Board of Pharmacy*, 181 N.W.2d 738 (N.D. 1970).

The North Dakota court's decision in the earlier case rested on its finding that Family Center Drug Store was under the actual control of Red Owl and Snyder's Drug Stores and that consequently Family Center Drug Store did not have a separate legal existence. 181 N.W.2d at 745. The court thus looked to whether or not Red Owl and Snyder's complied with Section 43-15-35(5) of the North Dakota Century Code requiring a majority of stock of a corporate applicant for a permit to operate a pharmacy to be owned by a registered pharmacist in good standing in North Dakota, and found that the requirement was not met. 181 N.W.2d at 746. The court did not, however, reach the issue of whether Section 43-15-35(5) was un-

constitutional because that issue had not been raised prior to the appeal. 181 N.W.2d at 745.

After receiving the adverse decision, Snyder's Drug Stores applied directly to the State Board for a permit to operate a pharmacy at the Red Owl Family Center. (Application for Permit, A.3-4) The application indicated that if the permit was granted, the pharmacy would be "conducted in full compliance . . . with existing laws, and with the regulations of the Board of Pharmacy." (Application for Permit, A.3) Snyder's also represented that proper sanitary conditions would be maintained, that required equipment and cabinets would be provided, and that Kenneth Swanson, a pharmacist registered and in good standing in the State of North Dakota, would be actively and regularly employed in and responsible for the management, supervision and operation of the pharmacy. (Application for Permit, pars. 12 & 13, A.4; Affidavit of Lloyd Berkus and Richard C. Johnson, par. 7, A.7) He in turn would be supervised by Irwin Livon, a pharmacist registered and in good standing in the State of Minnesota and the director of professional services for Snyder's. (Affidavit of Lloyd Berkus and Richard C. Johnson, par. 6, A.7) The application and the attached affidavit effectively established that Snyder's did or would meet all of the requirements of Section 43-15-35 for the issuance of a permit with the exception of the ownership requirement in subsection (5).

Subsequently on March 22, 1971, and without any kind of a hearing, the State Board summarily denied the permit, both because Snyder's failed to meet the ownership requirements of Section 43-15-35(5) and because the proposed pharmacy would, allegedly, fail to meet certain structural and safety standards imposed by the State Board. (Administrative Findings of Fact, etc., A.12-15)

On April 12, 1971, Snyder's filed its notice of appeal to the North Dakota District Court from the denial. (Notice of Appeal, A.15-16) The company alleged that Section 43-15-35(5) was unconstitutional and that there was no evidence to support the State Board's finding with respect to the adequacy of the proposed structural and safety provisions. (Specifications of Errors, A.16-18)

Six months later, on November 16, 1971, Snyder's served and filed a motion for summary judgment. (Motion for Summary Judgment, A.19-20) Two affidavits attached to the motion dealt with plans for the proposed pharmacy and the operation of other similar businesses in North Dakota. (Affidavit of Lloyd D. Berkus, A.20-22; Affidavit of C. Nicholas Vogel, A.22-23) A hearing on the motion was scheduled for December 3, 1971.

The return of the petitioner was filed on the day of the hearing with no attached or accompanying affidavits. (Return to Motion for Summary Judgment, A.23-24) Since no countering affidavits were ever submitted by the State Board, the record before the trial court consisted of Snyder's application for a permit, its supporting affidavits and the federal and state rules and regulations governing the distribution and sale of drugs in North Dakota.

Following the oral arguments on the summary judgment motion, the district court held in favor of Snyder's Drug Stores on both the constitutional issue and the issues concerning the adequacy and legality of the Board's findings in other areas. (Findings of Fact, etc., A.24-32; Summary Judgment, A.32) In particular, the trial court concluded that the ownership requirements of Section 43-15-35(5) do not bear a reasonable relationship to the public health, safety and welfare and are not expedient and necessary for the protection of the public, and that consequently the statute violates the Due Process Clause of the Federal

Constitution. (Findings of Fact, etc., pars. IX & XI, A.30, 31)

On April 4, 1972, the State Board filed its notice of appeal to the North Dakota Supreme Court from the judgment granting Snyder's motion for a summary judgment. (Notice of Appeal, A.33) The specifications of error attached to the notice encompassed every conclusion made by the trial court. (Specifications of Error, A.34-37)

On October 31, 1972, the North Dakota court rendered its decision. It held that, on the record before it, Section 43-15-35(5) of the North Dakota Century Code was unconstitutional. In arriving at this decision, the court specifically noted that as in *Liggett Co.* v. *Baldridge*, 278 U.S. 105 (1928), the State Board did not present any evidence on the constitutional issue to the trial court and gave no assurance to the Supreme Court that specific evidence justifying the legislation could be submitted on remand:

> "Having no assurance from the Board of Pharmacy that specific evidence lacking in *Baldridge* and so far lacking in the instant case could be supplied on a remand, notwithstanding the Board's request that this case be remanded to the trial court with instructions to remand to the Pharmacy Board for an evidentiary hearing on the constitutional issue, and because of the Board's failure to this date to produce such evidence, we hold that this request comes too late.
>
> "Being bound by the decision of the United States Supreme Court in *Baldridge*, and seeing insufficient basis for distinguishing that decision from the instant case, we sustain the trial court's conclusion that Section 43-15-35(5), N.D.C.C., violates the due-process clause of Section 1 of the Fourteenth Amendment to the United States Constitution."

202 N.W.2d at 144.

The North Dakota court did, however, find genuine issues of material facts with respect to the safety and structural provisions and remanded to the State Board of Pharmacy for an administrative hearing on those issues. 202 N.W.2d at 145. A judgment on remittitur was entered against the State Board on January 4, 1973. On February 20, 1973, the Board filed its petition for a writ of certiorari seeking review of the judgment, and the petition was accepted by this court on April 23, 1973.

SUMMARY OF ARGUMENT

The basic theme of the petitioner's argument is that the United States Supreme Court's decision in *Liggett Co. v. Baldridge*, 278 U.S. 105 (1928) is out of date and should be reversed. The petitioner misconstrues the *Liggett Company* holding. Whatever may have been the prevailing attitude of the Supreme Court members with respect to state and federal legislation during the first thirty years of the twentieth century, two aspects of the *Liggett Company* decision stand out and are still good law today.

The first involves the applicable standard of review of legislation sought to be sustained as a valid exercise of a state's police power. To sustain such a contention, the court held that the statute must bear "a real and substantial relation to the public health, safety and morals, or some other phase of the general welfare." 278 U.S. at 111-112. None of the Supreme Court decisions since 1928 have radically altered this formulation of the standard for reviewing legislation sought to be held under the state's police power. Even today there still must be some kind of evil the legislation was designed to remedy and the legislation must in fact have some tendency to correct the evil or otherwise be rationally related to it.

The second aspect of the *Liggett Company* decision involves the obligation of those seeking to uphold the legislation to produce at least some evidence to show the alleged rational connection between the legislation and a permissible public purpose when a suspect statute is challenged and the challenger shows that the legislation apparently adds nothing to the protection of the public health, safety and welfare. The court held that if the other party fails to come forward with at least some evidence showing or suggesting a rational basis for the legislation, the legislation cannot be upheld. 278 U.S. at 113, 114.

In this case, the evidence presented by Snyder's in the form of affidavits, state and federal statutes and the State Board's own regulations established that in North Dakota the restrictive ownership legislation of Section 43-15-35(5) in no way promoted the health, safety or welfare of the people of North Dakota. Such evidence gave firm support to the conclusion of the trial court and the North Dakota Supreme Court that the statute failed to comply with the reasonableness standard.

The petitioner, on the other hand, failed to produce any evidence supporting its contention that a statute restricting the ownership of pharmacies to pharmacists or corporations controlled by pharmacists has some relation to the public health, safety and welfare. No affidavits or other documents were submitted to the district court at or prior to the summary judgment hearing to establish a reasonable relationship between the legislation and the public health or even to indicate that such evidence might be forthcoming at trial. Such affidavits are required by Rule 56(e) of the North Dakota Rules of Civil Procedure, which prohibits an adverse party from resting "upon the mere allegations or denials of his pleading," and requires him to "set forth specific facts showing that there is a

genuine issue for trial." In the absence of any evidence tending to establish a rational relationship between the ownership requirement of Section 43-15-35(5) and the public health, safety and welfare and on the basis of the evidence presented by Snyder's showing there was no such relationship, the North Dakota District Court and the North Dakota Supreme Court had no alternative except to find the legislation unconstitutional.

The rationalizations suggested by the State Board of Pharmacy to sustain the legislation are completely unsubstantiated by any evidence appearing in the record of this case and cannot stand up under scrutiny. The arguments, at best, illustrate only an irrational aversion to chain stores.

Cases upholding legislation prohibiting doctors from owning pharmacies and prohibiting corporate ownership and control over professionals who deal intimately and closely with individual members of the public likewise cannot sustain the legislation held unconstitutional by the North Dakota District Court and the North Dakota Supreme Court.

ARGUMENT

I.

In Liggett Co. v. Baldridge, This Court Held That Legislation Sought to Be Upheld Under the State's Police Power Must Bear a Reasonable Relationship to an Evil or Problem Affecting the Public Health, Safety and Welfare. This Standard Is Still Applicable Today.

The first three sections of the petitioner's brief constitute an appeal for a reversal of this court's decision in *Liggett Co.* v. *Baldridge*, 278 U.S. 105 (1928).

In that case, the State of Pennsylvania sought to uphold legislation restricting the ownership of pharmacies to pharmacists as a valid exercise of its police power. 278 U.S. at 111. After noting that the operation of a business is a property right protected by the Fourteenth Amendment and that corporations are persons within the meaning of the Fourteenth Amendment, 278 U.S. at 111, the Supreme Court, through Justice Sutherland, declared that the state could sustain its exercise of the police power "only when such legislation bears a real and substantial relation to the public health, safety, morals or some other phase of the general welfare." 278 U.S. at 112.

Upon reviewing the record, Justice Sutherland found no evidence tending to supply the necessary rational connection:

> "In the light of the various requirements of the Pennsylvania statutes, it is made clear, if it were otherwise doubtful, that mere stock ownership in a corporation, owning and operating a drug store, can have no real or

> substantial relation to the public health; and that the act in question creates an unreasonable and unnecessary restriction upon private business. No facts are presented by the record, and, so far as appears, none were presented to the legislature which enacted the statute, that properly could give rise to a different conclusion."

278 U.S. at 113.

Justice Sutherland's formulation of the standard for reviewing legislation sought to be upheld as a valid exercise of the state's police power has not substantially changed in the past forty-five years. For example, as recently as 1962, in *Goldblatt v. Town of Hempstead*, 369 U.S. 590, Justice Clark, speaking for a unanimous court, stated a similar standard as follows at pages 594-595:

> "The term 'police power' connotes the time-tested conceptional limit of public encroachment upon private interests. Except for the substitution of the familiar standard of 'reasonableness,' this Court has generally refrained from announcing any specific criteria. The classic statement of the rule in Lawton v. Steele, 152 U.S. 133, 137, 38 L ed 385, 388, 14 S.Ct. 499 (1894), is still valid today:
>
> > " 'To justify the State in . . . interposing its authority in behalf of the public, it must appear, first, that the interests of the public . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.' "

The Court's decisions involving the right of privacy and job qualifications have also indicated, at the very least that state legislation restricting personal liberty must at least have a reasonable relationship to the public health

and safety. See *Griswold* v. *Connecticut*, 381 U.S. 479 (1965); *Roe* v. *Wade*, ... U.S. ....., 35 L.ed.2d 147 (1973); *Schware* v. *Board of Bar Examiners*, 353 U.S. 232 (1951).

The state courts, even in the realm of economic regulation, have also applied a reasonableness test in reviewing legislation under the due process clause. See, for example, the North Dakota court's language in *Bob Rosen Water Conditioning Co.* v. *City of Bismarck*, 181 N.W.2d 722, 724-25 (N.D. 1970); *Fairmont Foods Co.* v. *Burgum*, 81 N.W.2d 639, 646 (N.D. 1957). See also 16 *Am.Jur.2d, Constitutional Law*, §§ 277 & 279.

Even the petitioner admits that state legislation should meet the reasonableness test, for the State Board does not assert that the legislation is acceptable under a different due process standard. Rather, it argued on page 13 of its petition for a writ of certiorari that the statute meets the *Liggett Company* test in that it "bears a real and substantial relation to the public health, safety, morals and general welfare," and in its brief the State Board asserts that the statute is "properly related" to the public health, safety and welfare. (Petitioner's Brief, p. 21).

It may be true that in the past the Supreme Court has misapplied this standard in order to strike down legislation which its members thought was unwise or contrary to their own economic philosophy. See *Ferguson* v. *Skrupa*, 372 U.S. 726, 729 (1963); *Williamson* v. *Lee Optical of Okla.*, 348 U.S. 483, 488 (1955). The fact that during the years before and after the *Liggett Company* decision was rendered the Supreme Court referred to the standard in striking down legislation it thought unwise does not, however, necessarily mean that the standard was also misapplied in that case or that the standard enunciated by the Court at that time has no application today.

Surely, the courts have not completely abdictated to the state legislatures the responsibility for protecting persons, including corporations, from legislation which bears no reasonable relation to admitted areas of state concern, such as the public health and safety, simply because economic regulation involving jobs and property ownership is involved rather than an unreasonable legislative infringement on other areas of freedom and liberty clearly protected by the due process clause.

In both areas legislative action should be subject, at a minimum, to a reasonableness standard and effective judicial review. Certainly, there is no reason in logic or in history to limit the "liberty" referred to in the Fourteenth Amendment to only those areas where economics and jobs are not involved. As at least one commentator has noted, from a practical standpoint an individual's right to better his economic position is as important to him as many First Amendment rights:

> "It should hardly be necessary to state that the right to engage in a gainful occupation and to seek to better one's economic position is of basic importance to the individual. From a practical standpoint, this right is as important, and as deserving of protection as are First Amendment rights."

Hetherington, "State Economic Regulation and Substantive Due Process of Law," 53 Nw. U. L. Rev. 226 (1958). See also McCloskey, "Economic Due Process and the Supreme Court: An Exhumation and Reburial," 1962 Sup. Ct. Rev. 34 at 48.

Thus, the cases and judicial consistency still require that if legislation is sought to be upheld under the state's police power it must meet the reasonableness test, even where economics, jobs and property ownership are involved.

II.

The Conclusion of the District Court That Section 43-15-35(5) Bears No Reasonable Relationship to the Public Health, Safety and Welfare Was Compelled by the Evidence Before That Court. Since the State Board Failed to Produce Any Evidence at Any Stage of the North Dakota Proceedings Tending to Establish Any Reasonable Connection Between the Statute and the Public Welfare, the Conclusion of the Trial Court Must Stand.

Following his review of the application for a permit and the affidavits submitted by Snyder's Drug Stores and various applicable federal and state statutes and regulations, the district court concluded that the ownership requirement of Section 43-15-35(5) was not reasonable and bore no real relation to the public health, safety or welfare:

> "The requirement that a majority of the stock of a corporate applicant for a permit to operate a pharmacy in the state of North Dakota be owned by registered pharmacists in good standing in North Dakota is not a reasonable requirement; it does not bear a definite relation to the public health, safety, and welfare and is not expedient and necessary for the protection of public health, public safety, public morals or public welfare. The requirement has no real, substantial relation to public objects which the government may legally accomplish, since it adds nothing to the legitimate regulation of drugs, pharmacists and pharmacies in the state of North Dakota, all of which are already closely and directly regulated by various federal and state statutes and agencies."

(Findings of Fact, etc., par. IX, A.30)

His conclusion finds clear support in the record. The North Dakota statutes and regulations show that North Dakota, like Pennsylvania at the time of the *Liggett Company* decision, closely regulates the manufacturing, labeling, prescribing, compounding, purchasing and selling of drugs and medicines by appropriate legislation. Only registered pharmacists or their assistants or licensed physicians, for example, can manufacture, compound, sell or dispense poisons, medicines and chemicals for medicinal use in the state. *N.D.C.C.* § 43-15-14. The management of pharmacies must be under the personal charge of a pharmacist duly registered under the laws of the state. *N.D.C.C.* § 43-15-35(4). All pharmacies must be equipped with proper pharmaceutical and sanitary appliances and have the equipment necessary to fill prescriptions accurately and properly. *N.D.C.C.* § 43-15-35(2) & (3); Regulations of the North Dakota Board of Pharmacy, § 12. Pharmacists who mislabel drugs or improperly fill out prescriptions are subject to criminal penalties. *N.D.C.C.* § 43-15-43. Pharmacists must also meet stringent requirements in order to be registered at all within the state. *N.D.C.C.* § 43-15-15. Narcotics, depressants, stimulants, hallucinogenic drugs, and other substances subject to abuse are closely regulated by the state laboratories under the new Uniform Controlled Substances Act passed by the 1971 session of the North Dakota legislature. *N.D.C.C.* Chap. 19-03.1. Drugs are also closely regulated in order to insure strict compliance with standards of purity, strength and quality. *N.D.C.C.* § 19-02.1-13. In addition, the federal authorities closely oversee the manufacturing, labeling and sale of drugs. 21 *U.S.C.A.* §§ 351 *et seq.*, 21 *C.F.R.* §§ 130.1 *et seq.* Thus, in North Dakota, as in Pennsylvania at the time of the *Liggett Company* decision, drugs in all forms are closely regulated and controlled by state and federal agencies.

Snyder's application and affidavits indicated that a registered pharmacist would be responsible for the management, supervision and operation of the pharmacy at all times. (Affidavits of Lloyd Berkus and Richard Johnson, par. 7, A.7) He, in turn, would be supervised by another registered pharmacist registered in Minnesota. (Affidavits of Lloyd Berkus and Richard Johnson, par. 6, A.30) The new pharmacy would have the references and equipment required by the State Board and would maintain proper sanitary conditions. (Application for Permit, pars. 8-13, A. 3-4) Except for the ownership requirement, the pharmacy would be operated in full compliance with existing North Dakota and federal laws and with the valid regulations of the State Board. (Application for Permit, A.3) In general, the proposed pharmacy at the Red Owl Family Center would be a model pharmacy in full compliance with all statutes and regulations with the one exception.

Under such circumstances the district court's finding and conclusion that the ownership requirement of Section 43-15-35(5) failed to meet the reasonableness standard is certainly not clearly erroneous and in fact was compelled by the evidence in the record.

Actually, there was nothing in the record before the district court which would support any other finding or conclusion, for in this case the State Board failed to produce at the district court level or even before the North Dakota Supreme Court any evidence tending to justify the legislation as a valid exercise of the police power.

Such a failure is inexcusable. At least from the time Snyder's Drug Stores filed its application for a permit in January, 1971, the State Board must have been well aware that the constitutionality of the ownership requirement would be challenged through a judicial proceeding. If evidence tending to substantiate the statute actually

existed, the State Board should and could have started at that point to gather such evidence. Certainly, by the time the motion for summary judgment was submitted some six months later the State Board should have had at least some idea of the evidence, if any, it would be relying upon to support the legislation, and should have prepared the necessary affidavits indicating that there was an issue of fact with respect to the constitutionality of the legislation. Yet, it never submitted any affidavits or made any offer to produce or even gave any indication to the district court that it would produce evidence relating to the constitutionality of Section 43-15-35(5).

Under Rule 56(e) of the North Dakota Rules of Civil Procedure, it is incumbent upon a party responding to a motion for summary judgment to set forth such specific facts that it may have showing that there is a genuine issue for trial:

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

N.D.R.Civ.P. 56(e). See *Ray* v. *Northern Sugar Corp.*, 184 N.W.2d 715, 718 (N.D. 1971).

The rule thus does not permit the Board to withhold its evidence, much less an announcement that it has some evidence, until the time of appeal. See 6 *Moore's Fed. Practice*, par. 56.15(6) at 2424.

The North Dakota District Court and the North Dakota Supreme Court thus had the same problem which faced

this Court in *Liggett Co.* v. *Baldridge, supra.* In that case, this Court felt compelled to hold that the Pennsylvania statute limiting the ownership of pharmacies to pharmacists failed to meet the due process requirements, at least in part because the record before it would permit no other conclusion:

> "In the light of the various requirements of the Pennsylvania statutes, it is made clear, if it were otherwise doubtful, that mere stock ownership in a corporation, owning and operating a drug store, can have no real or substantial relation to the public health; and that the act in question creates an unreasonable and unnecessary restriction upon private business. *No facts are presented by the record, and, so far as appears, none were presented to the legislature which enacted the statute, that probably could give rise to a different conclusion. . . . If detriment to the public health thereby [through the operation of chain drug stores] has resulted or is threatened, some evidence ought to be forthcoming. None has been produced, and, so far as we are informed, either by the record or outside of it, none exists.*" [Emphasis added]

278 U.S. at 113-14.

This same language was cited and emphasized by the North Dakota Supreme Court in its decision. *Snyder's Drug Stores* v. *North Dakota State Board of Pharmacy,* 202 N.W.2d 140, 144 (N.D. 1972). It, too, noted the complete lack of any evidence demonstrating a rational connection between the ownership requirement of Section 43-15-35(5) and the public health and safety:

> "Having no assurance from the Board of Pharmacy that specific evidence lacking in *Baldridge* and so far lacking in the instant case could be supplied on a re-

mand, notwithstanding the Board's request that this case be remanded to the trial court with instructions to remand to the Pharmacy Board for an evidentiary hearing on the constitutional issue, and because of the Board's failure to this date to produce such evidence, we hold that this request comes too late."

202 N.W.2d at 144.

To reopen the proceedings at this point simply because the State Board now indicates that it may have some experts to testify on its behalf, a request already denied by the North Dakota Supreme Court both on the appeal and on the petition for rehearing, is not justified under either the *Liggett Company* decision or the North Dakota Rules of Civil Procedure. The State Board had a fair opportunity during this litigation to present whatever evidence it had, and it failed to present anything. The five-year effort of Snyder's to secure a permit in North Dakota should at long last be rewarded.

III.

The Rationalizations Now Suggested by the Petitioner to Support the Legislation Are Not Persuasive and Find No Support in the Record.

The various rationalizations outlined by the State Board to uphold the statute as "related" to the public health, safety and welfare cannot stand up under scrutiny. The arguments, taken together, illustrate only an irrational aversion to chain stores.

The basic accusation is that corporations or chain stores are more profit oriented than owner-pharmacists, and that these companies will consequently force their pharmacists, all of whom would be duly registered, tested and qualified to practice in North Dakota, to permit drugs

to deteriorate, to accept low quality work, and otherwise to act in a manner detrimental to the citizens of the State of North Dakota. There was, of course, no evidence submitted at the trial court level to substantiate any of these unfounded accusations; there was not even any assertion that specific facts supporting the claims would be produced at trial.

On the contrary, the evidence before the trial court—to the effect that a multitude of federal and state statutes and regulations already closely regulate the sale and quality of drugs in the state of North Dakota, that a qualified pharmacist would be in charge of the management and operation of the pharmacy and that the pharmacy would comply with all valid rules and regulations of the State Board of Pharmacy—showed no relation between the legislation and the public health, safety and welfare of the people of North Dakota.

The successful operation of chain drug stores in practically every state of the Union but North Dakota and of the corporate pharmacies operating in North Dakota under the grandfather clause clearly demonstrates that the service provided the public by these stores is more than adequate and certainly constitutes no threat to the public health or welfare. Our research, in fact, has shown that only one other state, Michigan, has restrictive pharmacy ownership legislation similar to that in North Dakota, and the Michigan statute was thought to be unconstitutional by four of five judges speaking to the constitutional issue. *Superx Drugs Corp.* v. *Michigan Board of Pharmacy*, 146 N.W.2d 1, 10-19, 19-23 (Mich. 1966). Three of the judges found in favor of the drug company without reaching the constitutional issue, *ibid* at 5-10; and only one judge thought the legislation constitutional, *ibid* at 1-5. Thus, even in the one other state with such legislation, the statute is on shaky grounds.

On an individual basis, each of the seven explanations advanced by the Board to support the statute is either not applicable to the present case or is completely unsupportable or both. For example, with respect to the suggestion that corporate pharmacies would permit their drugs to deteriorate (Claim No. 1), federal statutes require special labeling for drugs liable to deterioration. 21 *U.S.C.A.* § 352(h). Regulations issued in compliance with this statute require drugs to bear an expiration date which is either set by the detailed regulations with respect to each drug or is set after the drug manufacturer establishes to the satisfaction of the government the length of time a particular drug will remain stable. See 21 *C.F.R.* §§ 148.3 (a)(3) & 148.3(b)(5). Streptomycin tablets, for example, must have an expiration date of 24 months, unless the manufacturer produces sufficient proof that a particular batch will have a longer stable life. See 21 *C.F.R.* § 146b.-104(c)(1)(i). The Federal Regulations then provide that drugs cannot be disposed of through either commercial or charitable channels after the expiration date expires, unless their potency has been redetermined. 21 *C.F.R.* § 146.9.

On the state level, the legislature has also enacted statutes to insure that drugs comply with strict standards of purity, strength and quality. *N.D.C.C.* § 19-02.1-13. The Board of Pharmacy could directly discipline any pharmacist or drug store which attempts to sell drugs not meeting these standards.

The fourth explanation and part of the first explanation offered by the Board concern problems that might result because the pharmacists would be supervised by an untrained manager. In the present case, this could not happen at the local level because the drug store would be under the supervision and management of a qualified pharmacist. (Affidavit of Lloyd Berkus and Richard John-

son, par. 7, A.7) This pharmacist would in turn be supervised on a regional level by another Snyder's pharmacist registered and in good standing in the State of Minnesota. (Affidavit of Lloyd Berkus and Richard Johnson, par. 6, A.7) In any event, there were absolutely no facts or other proof offered to the trial court by the State Board which would support the accusation that pharmacists in chain drug stores are less accountable or less proficient or less responsible than those in drug stores owned by pharmacists.

Part of the second and fifth explanations offered by the Board concern accountability for illegal or detrimental acts. The Board seems to think that licensed pharmacists employed by corporations in North Dakota will commit illegal acts when told to do so by their employers and that they will then deny responsibility along with the corporation. An employee cannot, of course, avoid responsibility for illegal acts on the grounds he was told to commit them by his employer. To the extent that the corporation ordered, approved of or otherwise participated in an illegal act, it too would be responsible. 21 *Am.Jur.2d, Criminal Law* § 133. For civil wrongs committed by its employees, the corporation would typically be liable under the doctrine of respondeat superior. 53 *Am.Jur.2d, Master & Servant* § 404. Locating responsibility for acts of corporate agents is no real problem today.

The sixth rationalization and part of the third and fifth rationalizations proffered by the Board concern the problem of commercialism in corporate pharmacies. Again, this excuse for the statute does not stand up under scrutiny. For one thing, there is absolutely nothing to support the accusation that chain stores or other corporate pharmacies are any more profit oriented than owner pharmacists. In fact, the apparent desire on the part of independent own-

ers-pharmacists to limit entry into the retail drug market, thereby raising drug prices and their own profits, clearly demonstrates a strong profit orientation which might cloud their own service responsibilities. Furthermore, the presence of capable, licensed pharmacists in charge of and responsible for the mixing and dispensing of drugs at the proposed pharmacy insures that the public will be adequately protected. The successful operation of chain drug stores and corporate pharmacies in numerous other jurisdictions, as well as those currently operating in North Dakota, clearly indicates that the fears of the State Board are completely unfounded.

The seventh reason, restricting doctor-owned pharmacies, may have some legitimacy. The legislative history of the statute in fact suggests that this was the single argument offered to the North Dakota legislators to sustain the statute. The minutes of the House General Affairs Committee for March 1, 1963, for example, indicate concern only over the encroachment of doctors and clinics into the pharmacy business. (A copy of those minutes is appended to this brief.) Chain operations were not even mentioned.

The device of prohibiting all corporations not themselves controlled by pharmacists from owning pharmacies, however, is not a reasonably necessary means of eliminating doctors, and the statute must fall for this reason. As Justice Clark, quoting from *Lawton* v. *Steele*, 152 U.S. 133, 137 (1894), observed in *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590 (1962), at page 595:

> " 'To justify the State in . . . interposing its authority in behalf of the public, it must appear . . . second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals'."

Cf. *Griswold* v. *Connecticut*, 381 U.S. 479, 485 (1965). Surely a statute, whose sole purpose is to prevent doctors from owning pharmacies, cuts an unconstitutionally broad swath if it attempts to accomplish this arguably legitimate goal by prohibiting everyone except pharmacists from owning pharmacies. Consequently, this reason is by itself insufficient to support the statute.

In summary, then, none of the rationalizations offered by the State Board can sustain this legislation on the basis of this record. Rather the record establishes that Section 43-15-35(5) violates the Due Process Clause of the Fourteenth Amendment.

IV.

The Treatment by Other States of Dentists, Doctors, Lawyers, Optometrists and Other Professionals Who Deal Directly and Closely with the Members of the Public Does Not Support the Legislation Restricting the Ownership of Pharmacies in North Dakota to Pharmacists. Other State Court Cases Cited by Petitioner Are Distinguishable.

The various state court cases cited on pages 22-27 of the State Board's brief are not relevant to the present action, since they do not involve professions and businesses similar to drug stores and pharmacies. Unlike pharmacies and drug stores, dentistry, optometry, medicine, and other similar professions involve close personal contact between the person seeking the service and the person giving the service. In many, if not most, cases of drug purchases, the purchasers do not even know the druggist, and certainly have very little personal contact with him.

The parallel noted in the article in 141 *Notre Dame Lawyer* 49, quoted on pages 25 and 26 of the State Board's

brief, clearly demonstrates the difference. As pointed out in that article, the relationship between a physician and a pharmacist on the one hand and an optometrist and an optician on the other hand is quite similar. The optometrist and the physician work closely and personally with the client or patient. The optician and the pharmacist, on the other hand, merely distribute to that client or patient the materials or medicines prescribed by the optometrist or the physician. The optometrist and the physician, because of the close and personal nature of their contact with the person seeking the service cannot in some states be subject to corporate control. Opticians, on the other hand, to our knowledge, have not been subjected to similar restrictions. Pharmacists should not be either.

Another distinguishing feature is that the practice of dentistry, optometry or medicine does not require the substantial capital outlays that must be made by those going into the drug store business. Consequently, the ownership restrictions in the dentistry and optometry fields do not have the same competition inhibiting effect that the ownership restrictions in the pharmacy field have.

The three state court cases cited on pages 12 and 13 of the petitioner's brief can likewise be easily distinguished. For example, in *Magan Medical Clinic* v. *California State Bd. of Medical Examiners*, 57 Cal. Rptr. 256 (Cal. App. 1967), the contested California statute prohibited only doctors from owning pharmacies, obviously a much more limited prohibition than that effected by the North Dakota statute. Moreover, the record before the California trial and appellate courts contained evidence of substantial abuses by some doctors in California who did own pharmacies. 57 Cal. Rptr. at 260, fn. 1.

The Maryland appellate court case, *Brooks* v. *State Board of Funeral Directors and Embalmers*, 195 A.2d 728

(Md. App. 1963), involved funeral directors, not pharmacists, and prohibited any corporation from engaging in the business of funeral directing. Thus, only a particular kind of ownership was prohibited. The statute did not attempt to secure monopoly power over a particular type of business for a limited group of individuals.

The third case, *Superx Drugs Corp.* v. *Michigan Board of Pharmacy*, 146 N.W.2d 1 (Mich. 1966), has, as seen, an appropriate factual situation, but hardly supports the State Board's position since only one of the eight deciding judges found the statute both applicable and constitutional.

CONCLUSION

In conclusion, then, the record in this case clearly supports the conclusions of both the North Dakota trial court and the North Dakota Supreme Court that Section 43-15-35(5) of the North Dakota Century Code violates the due process clause of the Fourteenth Amendment to the United States Constitution, since the statute was shown to bear no reasonable relationship to the health, safety or welfare of the people of North Dakota. The decision of the North Dakota Supreme Court should be upheld.

Respectfully submitted,

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APPENDIX A

GENERAL AFFAIRS COMMITTEE MIN. Mar. 1

Roll call taken quorum present.

SB 106 Reifer Layman Fargo the stockyard business Baldwin
This is permissive legislation basicly changes present law. raises acreage for fair purposes and also levy raise.
Fitch do pass sec. Haugen.

SB 162
Vernon Peterson Highway dept attorney
this corresponds with HB 639 and SB 106 Cost of moving certain property is more expensive then some.
referred to Judiciary committee
SB 63 Bier do pass, Vinge sec. Frank has this on the floor

SCR SFrank moved to do pass Weber sec. Haugen has on the floor
SCR VVinge to do pass Frank sec. Bier on floor.
SCR EE Fitch moved we delete the Legislative Research Comm. and insert the Sec. of State. Bilden sec.
Reiger do pass as amended Weber sec. Reiger on floor.
SB 272 Vinge moved we refer this to Pol. Sub Committee
Currie moved we reconsider our action on this Bier sec.
Frank accept the amendments Hauf sec.
Hauf do pass as amended

SB 176 Senator Lips.
insurance for state employees is long overdue five dollars taken out of salary this is permissive legislation because it does not authorize any company

Bilden moved we insert (and group life insurance) sec. by Olsen
Baldwin do pass as amended Olsen sec.
SB 340 Weber on floor
Senator Sinner
Pharmacy is becoming more specealized all the time. This is directly intentional to keep doctors from taking over the pharmacies.
James Moore Pres. State Board of Pharmacy felt the doctors are taking over the pharmacy of N.D. There are 13 pharmacy clinics now. The Bis pharmacys are owned and operated by pharmacicts. Clinic pharmacy takes away small town drug business
Doctors were not trying to be malicious but just giving a service.
Edwin M. Deibe
Ansel Sirkaman
Gene Sinner Fargo
if this is passed it would stop further pharmacys from being set up in clinics. A clinic has a limited supply of drugs and drug products as compared to large varity of a frug store
Dan Baily Rugby, Howard Cole, Carl Baler Harvey, Tony Walters, Bis.
Gus Samuelson Bis
Weist Wishek
Against the bill
Ray McAlpine Missouri Valley Clinic
This is fence legislation and not good for N D
Alvin Doerr Sec. of state board of pharmacy
Rep Vinge moved for do pass Bildin sec.
Rep. Frank moved for Indefintite Postpone Currie sec. lost.
Do Pass carried

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1176

NORTH DAKOTA STATE BOARD OF PHARMACY
Petitioner,

v.

SNYDER'S DRUG STORES, INC., *Respondent*

On Writ of Certiorari to the Supreme Court of North Dakota

BRIEF OF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF CHAIN DRUG STORES, INC., IN SUPPORT OF RESPONDENT

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INTEREST OF THE AMICUS

This Amicus Curiæ Brief is filed, with the consent of counsel for the parties, on behalf of the National Association of Chain Drug Stores, Inc., (NACDS), a New York not-for-profit corporation supporting Respondent and urging the Court to affirm the decision of the Supreme Court of North Dakota.

NACDS represents a membership of 238 chain drug corporations which operate approximately 9500 retail drug stores and leased pharmacy departments throughout the United States. The member firms of NACDS employ over 25,000 pharmacists licensed to practice their profession in each of the states where they are located. In addition, NACDS members employ over 150,000 non-professional personnel in providing a wide variety of products and services to the public. In 1972, their annual sales accounted for 8.7 billion dollars, or 60.1% of the total retail drug market, and their prescription drug volume amounted to 1.5 billion dollars representing over 383 million individual prescriptions.[1]

The entry of chain stores into the retail drug business about a half century ago engendered a massive resistance on the part of the independent pharmacists. They organized national, state and local pharmacy associations, which have used every available political, legislative and litigation means to impede and obstruct the entrance of chain stores into the retail drug market.[2] NACDS' vital interest in this case stems from this long-standing attempt by independent pharmacists and their national and state associations to obstruct the entrance of chain stores into the retail drug market.

The enactment of the type of statute[3] held unconstitutional by the Supreme Court of North Dakota in the instant case is one method utilized by chain store opponents to restrict competition.

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[1] 1973 Annual Report of Chain Drug Industry, Chain Store Age, pp. 26-28 (May, 1973).

[2] F. Marion Fletcher, *Market Restraints in the Retail Drug Industry*, pp. 137, 273 (1967), University of Pennsylvania press.

[3] North Dakota Century Code, Section 43-15-35(5).

North Dakota is the only state to have enacted such an ownership law since the early 1930s[4] under the guise of protection of the health and welfare of its citizens, citing as an "evil" the control of professional pharmacists by lay persons.

NACDS does not quarrel with the concept that a pharmacist is a "professional" and it agrees with the need for high professional and ethical standards on the part of all pharmacists. However, we vigorously disagree with the theme that runs through petitioner's brief and that of the opposing *amici curiae* that a pharmacist employed by a chain drug store would be subjected to some pressure to act in an unprofessional way or is less ethical or less professional than the owner-pharmacist or the pharmacist employed by an independent drug store. There is simply no evidence to justify these unfounded conclusions.

Although the modern chain drug store offers a greater variety of products and services than its predecessors, the pharmacy, or prescription department, has always retained its place as the most valuable and important part of the chain drug store. The requirements for active membership in NACDS emphasizes the importance of the pharmacist and make a pharmacist's presence mandatory in each member store. Article III Section 2 of the NACDS By-laws reads as follows:

> "Section 2—Active Members: Any person, firm or corporation engaged in operating retail drug stores shall be eligible for Active Membership in the Corporation. Retail drug stores shall mean four (4) or more stores *in each of which there is a regis-*

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[4] F. Marion Fletcher, *Market Restraints in the Retail Drug Industry*, pp. 143-145, supra.

> *tered pharmacist regularly employed to dispense prescriptions and for professional counsel.* Any person, firm, or corporation operating less than four (4) stores who is a member in good standing at the time of passage of this section [May 7, 1967] of the By-Laws shall not be ineligible for membership." (Emphasis supplied).

In addition, Article I of the NACDS Code of Ethics signifies the fundamental precept of the advancement of the profession of Pharmacy as an integral part of NACDS' policy. Article I reads as follows:

> "Every member shall promote and advance the profession of pharmacy as the foundation of our industry and shall jealously guard its good name."

NACDS respectfully submits that the stock ownership type of statute held unconstitutional in this case affords a select group the means to restrain trade and prevent competition in the retail drug market. For this reason the judgment of the Supreme Court of North Dakota was clearly correct and should be affirmed.

ARGUMENT

I

Section 43-15-35(5) of the North Dakota Century Code Violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

In the North Dakota Supreme Court, respondent asserted that the Board's denial of a permit to operate a drug store for failure to meet the stock ownership requirements, violated the equal protection clause of the Fourteenth Amendment to the United States Constitution. (Petition for Cert., p.20). However, the North Dakota Supreme Court rested its decision exclusively on the due process clause, relying upon, and consider-

ing itself bound by, *Liggett Co.* v. *Baldrige*, 278 U.S. 105 (1928).

The North Dakota statute classifies corporations on the basis of stock ownership. Thus a corporation which does not meet the ownership requirements of the statute is ineligible for a permit even though the pharmacy department of its proposed drug store would be under the management of pharmacists registered in North Dakota. The practical effect of the provisions of the stock ownership provision of the statute is to limit the ownership of pharmacies and drug stores to a small select class of people, namely pharmacists licensed to practice in North Dakota. This classification cannot be justified under any view of the legitimate purpose of the statute. The scope of permissible regulation of the retail drug business was defined in *Milligan* v. *Board of Registration in Pharmacy*, 204 N.E.(2d) 504 (Mass., 1965) at pages 510-511:

> "Thus, the Legislature may regulate pharmacists and drug stores in a manner reasonably designed and appropriate to insure competence and diligence on the part of pharmacists, cleanliness of premises, the purity and safety of products sold, the prevention of the unlawful sale of narcotics and similar health matters."
>
> "When regulation is attempted beyond such matters more difficult questions of constitutional validity may arise concerning whether particular statutes, regulations, or policies or their application in particular circumstances, bear a reasonable relation to significant aspects of the public interest. Particularly is this so in respect of occupations, other than those (for example, insurance, banking, public utility operation, and the traditional professions) most obviously appropriately subject to public regulation. If such other occupations are

to be regulated in a manner which materially restricts qualified persons from engaging them, it is of special importance that there be apparent the public grounds which constitutionally justify the interference with such persons' freedom of employment and business activity."

"The tests to determine the validity of state statutes under the Equal Protection Clause have been variously expressed, but this Court requires, at a minimum, that a statutory classification bear some rational relationship to a legitimate state purpose." *Weber* v. *Ætna Casualty & Surety Co.*, 406 U.S. 164, 172 (1972).

In *Smith* v. *Cahoon*, 283 U.S. 553 (1931), a Florida statute prohibited any auto transportation company from operating any motor vehicle for the transportation of persons and property on the public highways without having first obtained from the Railroad Commission a certificate of public convenience and necessity and furnishing a bond for the protection of freight and passengers, but excepted from its requirements transportation companies engaged exclusively in transporting farm products, fish and shell fish, or dairy products. This Court held the statute unconstitutional upon the ground, among others that it denied equal protection of the laws, because "there does not appear to be the slightest justification for making a distinction between those who carry for hire farm products, or milk or butter, or fish or oysters, and those who carry for hire bread or sugar, or tea or coffee, or groceries in general, or other useful commodities." 283 U.S. at page 567. See, also, *Hartford Steam Roller Inspection & Ins. Co., et al.* v. *Harrison*, 301 U.S. 459 (1937).

Morey v. *Doud*, 354 U.S. 457 (1957), involved an Illinois statute which provided for licensing, inspection,

bonding and regulation of so-called "community currency exchanges" engaged in the business of cashing checks and issuing or selling money orders, but specifically exempted from its provisions money orders of the American Express Company. This Court held the statute invalid, as applied to the complainants, on the ground that it denied equal protection of the laws to those subject to the statute because of the exemption of American Express Company money orders, which were sold in competition with money orders issued and sold by the complainants. The Court based its decision on "the remote relationship of the statutory classification to the Act's purpose or to business characteristics, and the creation of a closed class by singling out of the money orders of a named company, with accompanying economic advantages." 354 U.S. at page 469.

Morey v. *Doud,* supra, has been cited as authority in recent decisions of this Court involving political or personal rights. See *Bullock* v. *Carter,* 405 U.S. 134 (1972); *Weber* v. *Aetna Casualty & Surety Co.,* supra.

The classification under the North Dakota statute is clearly not related to a "legitimate state purpose" since its obvious purpose is to eliminate chain drug stores from the North Dakota market.

II

Section 43-15-35(5) of the North Dakota Century Code Violates the Commerce Clause, Art. I, Section 8, Clause 3 of the Constitution of the United States.

NACDS is aware that the question of whether 43-15-35(5) of the North Dakota Century Code violates the commerce clause was not raised below, but, as subsequent argument will show, the commerce clause violation is so entirely clear that the Court ought to

take notice of it now, affirm the judgment below and thereby put an end to what otherwise may prove to be a costly and time-consuming litigation. Moreover, it would seem that the commerce clause issue may be considered under the equal protection or due process issue. See *Baldwin* v. *Seelig, Inc.*, 294 U.S. 511 (1935).

The purpose and effect of the North Dakota statute is to exclude from the North Dakota retail drug market virtually all chain drug stores. Such stores are for the most part owned by corporations which are engaged in business in many states.

There has been, and continues to be, a steady growth of chain drug stores and large independent drug stores, whereas medium independent and small independent drug stores have been declining in number.[5]

Chain drug stores have an important position in the retail drug business throughout the United States. According to the *amicus curiae* brief of the American Pharmaceutical Association, et al., at page 11, chain drug stores controlled 60.1% of the total national drug sales volume in 1972. Attached as Exhibit A to this Brief is a table showing in 1972 the total number of drug stores, the number of such stores owned by chains, and the chain drug store share of market in sixteen metropolitan areas throughout the United States.[6]

The widespread acceptance of chain drug stores is undoubtedly due to the benefits which they have produced for consumers. Chief among those benefits are

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[5] 38th Annual Nielsen Review of Retail Drug Store Trends, p. 7—chart 2.

[6] 1973 Annual Report of the Chain Drug Industry, Chain Store Age, pp. 18-19 (May, 1973).

lower prices for prescription drugs. Thus, the following table shows that the average prices of prescription drugs have been substantially lower in chain drug stores than in independent drug stores during the years 1966 through 1972.[7]

Average Prescription Price

Year	Chain Drug Stores	Independent Drug Stores
1966	3.16	3.59
1967	3.22	3.66
1968	3.29	3.70
1969	3.51	3.90
1970	3.63	4.06
1971	3.73	4.21
1972	3.91	4.36

The Court can take judicial notice that the drugs sold in all drug stores are produced by drug manufacturers which distribute their products throughout the United States. In the light of these facts it is apparent that the retail drug business is an integral part of a national distribution system which delivers prescription drugs to millions of consumers throughout the United States.

The stock ownership statute is aimed at preventing outsiders, non-residents, and foreign corporations from entering the North Dakota retail drug market. It is based on a philosophy of economic parochialism or

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[7] Prescription Drug Data Summary—1972 Department of Health, Education and Welfare, DHEW Publication No. (SSA) 73-11900 p. 31; 1973 Annual Report of the Chain Drug Industry, Chain Store Age, p. 28; 1971 Annual Report of the Chain Drug Industry, Chain Store Age, p. 25.

isolation as opposed to a free national market. It establishes a system of excessive protectionism for North Dakota pharmacists and erects a barrier against chain drug corporations. It bans more efficient enterprises to protect resident pharmacists from competition. This protectionism is inconsistent with the philosophy of the Constitution, which contemplates free, unencumbered trade among the states.

The statute should be declared unconstitutional under the doctrine enunciated in *Baldwin* v. *Seelig, Inc.*, 294 U.S. 511 (1935). In that case this Court declared unconstitutional under the due process and commerce clauses a New York statute which forbade the sale of any milk produced outside of that state which was purchased from the producer at a price lower than that required to be paid for milk produced within that state. The opinion of Mr. Justice Cardozo states, at page 527:

> "What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation. Formulas and catchwords are subordinate to this overmastering requirement. Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents. Restrictions so contrived are an unreasonable clog upon the mobility of commerce. They set up what is equivalent to a rampart of customs duties designed to neutralize advantages belonging to the place of origin. They are thus hostile in conception as well as burdensome in result. The form of the packages in such circumstances is immaterial, whether they are original or broken. The importer must be free from imposts framed for

> the very purpose of suppressing competition from without and leading inescapably to the suppression so intended."

This Court rejected the claim that the New York statute was within the police power since it would protect the health of local residents by assuring a regular and adequate supply of milk through the maintenance of minimum prices, and perceived the true purpose of the statute to be the suppression of competition. Equally, petitioner's elaborate justification of the North Dakota statute on the grounds of public health should be rejected and the statute should be regarded in its true light. In *Baldwin* this Court also refused to accept the argument that lower milk prices to producers would result in uncared for cattle and concluded that such evils should be dealt with directly. Similarly, in the present case, any evils relating to the control of drug stores have already been remedied by direct regulation without resorting to the exclusion of drug stores owned by the forbidden corporations. (Respondent's Brief pp. 13-14)

If the ownership of drug stores by corporations, as prohibited by the North Dakota statute, is an evil, then the appropriate remedy would be legislation by Congress rather than state legislation which would lead to "rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation." *Baldwin*, at page 522.

In *Dean Milk Co.* v. *City of Madison, et al.*, 340 U.S. 349 (1951), this Court held unconstitutional under the commerce clause an ordinance of the City of Madison which prohibited the sale of milk within that city unless it was processed and bottled at an approved plant within a radius of five miles from the central square

of the city. Citing *Baldwin* v. *Seelig, Inc.*, supra, the opinion of Mr. Justice Clark stated, at page 354:

> "In thus erecting an economic barrier protecting a major local industry against competition from without the State, Madison plainly discriminates against interstate commerce. This it cannot do, even in the exercise of its unquestioned power to protect the health and safety of its people, if reasonable nondiscriminatory alternatives, adequate to conserve legitimate local interests, are available."

The Court found that reasonable and adequate alternatives were available to Madison, as they are in the present case. It should be noted that in these cases the Court has formed its own conclusions as to the purpose of the challenged laws and has refused to sustain discriminatory economic legislation which is justified upon the pretext that it is related to the public health and safety. Moreover, less restrictive alternatives, adequate to meet the reasonable needs of the community, were required to be substituted for the extreme remedies that had been adopted.[8]

III

Section 43-15-35(5) of the North Dakota Century Code Violates the Due Process Clause of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

The question of the constitutionality of stock ownership statutes similar to the one in the instant case was properly put to rest in 1928 by this Court's decision in *Liggett Co.* v. *Baldrige*, 278 U.S. 105, on the ground that the statute did not bear a real and substantial

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[8] Struve, The Less-Restrictive-Alternative Principle and Economic Due Process, 80 Harv. L. Rev. 1463 (1967).

relation to the public health, safety and morals, or some other phase of the general welfare.

This type of stock ownership statute only serves to protect the vested interest of independent pharmacists and those other owners already operating drug stores in the state. Thus, a corporation which does not meet the stock ownership requirements of the statute is ineligible for a permit even though the pharmacy department in the drug store would be under the management and supervision of a pharmacist duly licensed under the laws of the State.

If the purpose of the statute was to protect the public health, safety, morals and general welfare of the public, the ownership requirements are at best irrelevant. Indeed, the statute may have an adverse effect upon the public safety and health since the pharmacists must have a direct interest in the profits of the enterprise. It is readily apparent that the real purpose of the statute is to exclude chain drug stores from the retail drug business in North Dakota.

Petitioner, at page 11 of its brief, argues that:

> "[t]he basic issue under the North Dakota statute is not one of ownership, but rather of control of the supervision and management of the pharmacy."

To the extent that the statute requires the pharmacy departments of drug stores to be under the control of pharmacists, it is not open to objection. In fact, *Amicus* would and does support such a requirement. But the statute goes much further and requires that the "majority stock" of a corporation eligible for a drug license must be *owned* by registered pharmacists.

It is the ownership requirement that raises the critical issue in this case.

At pages 14-18 of its brief, petitioner cites numerous unsupported allegations in an attempt to show that the stock ownership restrictions of the statute are related to the public health, safety and welfare.

NACDS would challenge the totally unsupported claims of petitioner that the "hired pharmacist" will insist that he is compelled "to yield to unlawful directions of untrained superiors"; or that ownership of drug stores by pharmacists would ease the task of enforcement agencies in dealing with unethical conduct; or that the ownership of drug stores by non-licensed individuals or corporations tends "to demoralize a professional undertaking by subjugating the professional standards to destructive commercial interests"; or that miracle drugs and "drug problems" make it more important that "the practice of pharmacy be free from commercialism"; or that the ownership of drug stores by pharmacists "will tend to assure a higher standard of competence in pharmacist-employees"; or that ownership of drug stores by non-pharmacists will create a risk that "social accountability will be subordinated to the profit motive", or that under laws which permit "purely commercial interests" to own drug stores, "the policies, practices and conduct of pharmacies are frequently unduly influenced by such commercial interests." (Petitioner's brief, pp. 15 *et seq.*)

The unsupported so-called "evils" set forth above are basically the same as were advanced in an effort to support the Pennsylvania Statute declared unconstitutional by this Court in *Liggett Co.* v. *Baldrige, supra.* It is interesting to note the language of the Court in holding that there was a total lack of evidence

that mere ownership of a drug store by one not a pharmacist threatens the public health, and stated as follows:

> "If detriment to the public health thereby has resulted or is threatened, some evidence of it ought to be forthcoming. None has been produced, and, so far as we are informed, either by the record or outside of it, none exists. The claim, that mere ownership of a drug store by one not a pharmacist bears a reasonable relation to the public health, finally rests upon conjecture, unsupported by anything of substance." 278 U.S. 105, 114.

Here, some 45 years later, we find the North Dakota State Board of Pharmacy making the same claims without producing any supporting evidence whatsoever. One would think that if such evidence were available, petitioner would have been able to gather and produce it over a span of 45 years.

There is absolutely no reason or evidence available to allege that pharmacists employed by chain drug stores are any less competent or ethical than pharmacists employed by other pharmacists or pharmacists who own their own stores; or that any of the dangers imagined by the petitioner will be avoided if ownership of drug stores is confined to pharmacists. If the profit motive or "commercialism" causes such dangers, there is no reason to assume that a pharmacist who owns a drug store and pays rent and meets a payroll is immune from the motive to operate his business profitably. To characterize the motive as "commercialism" is to intimate that there is something improper in the corporate organization of industry and that enterprises owned by corporations could endanger the public health and safety.

CONCLUSION

On these principles, the decision below should be affirmed. If the rationale of *Liggett Co.* v. *Baldrige*, supra, is not consistent with later decisions of this Court, its holding should be reaffirmed on the basis of the economic considerations referred to herein and the above decisions of this Court declaring invalid laws designed to protect local interests from outside competition.

Respectfully submitted,

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EXHIBIT A

Metropolitan Market	No. of Drug Stores	No. Chain Drug Stores	Chain Drug Store % Share of Market
New York	3,492	380	16.2
Chicago	1,867	614	56.2
Los Angeles-Long Beach	1,501	701	73.9
Washington, D. C.	559	330	84.0
Detroit	933	257	46.6
San Francisco-Oakland	812	411	72.1
Philadelphia	1,559	258	29.8
St. Louis	640	323	65.5
Boston	1,029	139	17.8
Baltimore	529	189	54.1
Cleveland	490	201	67.0
Pittsburgh	723	261	66.0
Minneapolis-St. Paul	366	133	52.7
Anaheim-Santa Ana	225	71	36.1
Seattle-Everett	362	112	44.0
Denver	306	127	60.4

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1176

NORTH DAKOTA STATE BOARD OF PHARMACY,
Petitioner,

vs.

SNYDER'S DRUG STORES, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA

PETITIONER'S REPLY BRIEF

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ARGUMENT

There have been many issues raised in the briefs on this appeal, however it is submitted that the basic issue is whether the North Dakota Supreme Court erred in relying on and basing its decision entirely on *Liggett* v. *Baldridge*, 278 U. S. 105, 49 S. Ct. 57, 73 L. Ed. 204 (1928), and whether the United States Supreme Court should now clearly reverse the *Liggett* case to conform with the latter cases and philosophy of this court.

If *Liggett* v. *Baldridge* is not reversed, the Supreme Court would have to revert to a policy it once had of sitting as a super legislature to judge the wisdom, need, desirability, and reasonableness of state laws. We do not believe the Supreme Court will do this.

The Liggett Case Is No Longer Controlling

Despite our argument that the *Liggett* philosophy has been clearly abandoned, the respondent still seeks to rely on it.

The *Liggett* case followed the philosophy of a line of cases shortly after the turn of the century which swung in the direction of requiring a state to prove the constitutionality of its exercise of the police power in such matters rather than presuming such statutes to be constitutional and putting the burden on the party claiming unconstitutionality to prove that the legislature could not possibly have had any reasonable basis for passing such legislation, as had formerly been the philosophy of the court.

Adair v. *U. S.*, 208 U. S. 161 (1908) and *Coppage* v. *Kansas*, 236 U. S. 1 (1915) considered legislation outlawing "yellow-dog" contracts under which employees agreed not to join the union and found them unconstitutional because the statutes impaired contractual rights without any substantial benefit to the public welfare. In the *Adair* case, the court cited *Jacobson* v. *Mass.*, 197 U. S. 11 (1905) and *Lochner* v. *N. Y.*, 198 U. S. 45 (1905) and without any presumption of constitutionality, posed the question as to whether the legislation was a fair and reasonable exercise of the police power of the state.

These decisions, which came to be known as the "Lochner-Adair-Coppage line of cases", along with a few others formed the background for the *Liggett* decision, requiring a showing that:

1. A dangerous situation demanding correction existed, and
2. The State must clearly demonstrate that the statute corrects a recognized evil and does not arbitrarily interfere with private business or impose unreasonable restrictions.

If the Court could not find these two factors present, the statute would be struck down as an unconstitutional denial of due process. To put it in simplest terms, it was as if the burden of proof was upon the State to show why a law was constitutional.

The Pennsylvania statute, adopted in 1927, which was struck down by the *Liggett* decision was almost an exact copy of one passed in New York State in 1923 and whose constitutionality had been upheld by the New York court in *Tucker* v. *N. Y. S. Bd. of Pharmacy*, 127 Misc. 538 (1926).

The majority in the *Liggett* case, speaking through Justice Sutherland followed the philosophy of the "yellow-dog" cases, requiring the state to bear the burden of proof, whereas Justice Holmes and Brandeis in their dissenting opinion clung to the earlier view, which was to be returned to by the court, that if *any* set of facts might justify the legislation it should not be struck down.

Despite the *Liggett* case, New York State continued to find constitutional its statute from which Pennsylvania had copied, as late as July 15, 1931, in *Hauges* v. *Lascoff*, 140 Misc. 811, where it was said:

> "It is by a statute such as the one under consideration that the State in the interest of public health and welfare can, to some measure, control the quality of service to be rendered to the sick. In effect, the command of the statute is addressed to the owner or proprietor of the pharmacy. There the responsibility should remain. Possible penal consequences for illegal acts by the proprietors of pharmacies are not enough. The demand is for consistent quality of pharmaceutical service. Public health means sound health, and it may reasonably require carefully regulated pharmacies to preserve it."

The *Hauges* case was not appealed, but the *Pratter* case was and, in 1932, the Appellate Division in New York State and in 1933, the U. S. Supreme Court struck down the New York statute on the basis of the *Liggett* decision. *Pratter* v. *Lascoff*, 140 Misc. 211; aff. 236 App. Div. 713; aff. 261 N. Y. 509; Cert. denied 289 U. S. 754.

Soon after the *Liggett* decision, the Supreme Court underwent a change in personnel, and, more important, a change in philosophy as regards the extent of the police powers of the states. As early as 1931 (although the Supreme Court stated 1934 as being the turning point in the *Lincoln Union* case, infra), the Supreme Court indicated this shift in emphasis. The case was *O'Gorman and Young, Inc.* v. *Hartford Fire Insurance Company*, 282 U. S. 251 (1931). In question was the constitutionality of a New Jersey law fixing the maximum commissions that could be paid to brokers by insurance companies at "a reasonable rate", and stipulating that no more could be paid to one broker than to another. In upholding the validity of the statute, the majority said:

> "The statute here questioned deals with a subject clearly within the scope of the police power. We are asked to declare it void on the grounds that the specific method of regulation prescribed is unreasonable and hence deprives the plaintiff of due process of law. As underlying questions of fact may condition the constitutionality of legislation of this character, the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute."

It might be noted that the majority opinion was written by Justice Brandeis, who had joined in Justice Holmes' dissent in the *Liggett* case, and joined in by Justices Holmes, Hughes, Stone and Roberts. Justice Sutherland

was part of the dissenting group in this case, and that dissenting opinion cited *Liggett* v. *Baldridge* and the *Adair-Coppage* line of cases.

Thus, the Court started its return to the position it had originally taken in this area. The presumption of constitutionality of a state police-power statute took over. The Court refused to place itself in the position of being a super-legislative body which weighs the wisdom of statutes. Laws enacted under the power of the state to protect the public health, safety, morals or general welfare would be presumed constitutional—with the presumption of facts before the Legislature to go with it—and only a very strong showing by those challenging the statute would cause the Court to declare a statute unconstitutional. This shift in emphasis becomes more and more apparent as we continue to trace the cases through the Supreme Court.

In 1934, the Supreme Court, in *Nebbia* v. *New York*, 291 U. S. 502, had before it a New York statute which fixed the price at which milk was to be bought and sold within the State. In upholding the constitutionality of the Act, the Court rejected the narrow view of a state's jurisdiction in exerting its police power, and as regards the Due Process clause, stated:

> "The Fifth Amendment, in the field of federal activity and the Fourteenth, as respects state action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious."

In 1935, in *Semler* v. *Oregon State Board of Dental Examiners*, 294 U. S. 608, the Court upheld the validity

of an Oregon statute prohibiting dentists from advertising prices, advertising professional superiority, etc. The Court said in a unanimous opinion:

> "The State has the authority to estimate harmful effect, both in relation to deception and in relation to lowering the standards of the profession and demoralizing it. If the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied."

Two 1949 cases place the philosophy of the Court in full perspective. *Lincoln Federal Labor Union* v. *Northwestern Iron and Metal Company,* 335 U. S. 525, and *Daniel* v. *Family Security Life Insurance Company,* 336 U. S. 220.

The *Lincoln Union* case involved two measures, which the Court treated as one. One was a Nebraska constitutional amendment and the other was a North Carolina statute. Both measures prohibited contracts between employers and unions which would make union membership a prerequisite for the employer engaging an employee. The provisions stated that a person could not be denied employment on the basis of membership or nonmembership in a labor union.

The Court unanimously upheld the constitutionality of the provisions, with Justices Frankfurter and Rutledge writing separate concurring opinions. The opinion of the Court reviewed the *Lochner-Adair-Coppage* line of cases, and then reviewed the cases which undermined the philosophy of that line of cases:

> "This Court, beginning at least as early as 1934, when the Nebbia case was decided, has rejected the due process philosophy enunciated in the Adair-Coppage

line of cases. In doing so, it has consciously returned closer and closer to the earlier constitutional principle that states have power to legislate against what are found to be injurious practices in their internal affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition or of some valid federal law."

In the *Daniel* case, the Supreme Court unanimously upheld the validity and constitutionality of a South Carolina statute which prohibited morticians from acting as agents for insurance companies. The Court stated:

"We cannot say that South Carolina is not entitled to call the funeral insurance business an evil. Nor can we say that the statute has no relation to the elimination of those evils. There our inquiry must stop.

"This rationale did not find expression in *Louis K. Liggett* v. *Baldridge* on which respondents rely. According to the majority in Liggett, 'a state cannot, under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them.' But a pronounced shift of emphasis since the Liggett case has deprived the words 'unreasonable' and 'arbitrary' of the content for which respondents contend."

The Court then referred back to the *Lincoln Union* case and that case's review of the *Lochner-Adair-Coppage* refutation.

In 1952, in *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U. S. 421, the Supreme Court was called upon to rule on the constitutionality of a Missouri statute requiring employers to give four hours off with pay to all employees

in order that they might vote. With only one dissenting voice, the Court upheld the constitutionality of the provision. The Court said:

> "The liberty of contract argument pressed on us is reminiscent of the philosophy of *Lochner* v. *New York*, which invalidated a New York law prescribing maximum hours for work in bakeries; *Coppage* v. *Kansas*, which struck down a Kansas statute outlawing 'yellow dog' contracts, * * * and others of that vintage. Our recent decisions make plain that we do not sit as a super-legislature to weight the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare * * * The State legislatures have constitutional authority to experiment with new techniques; they are entitled to their own standard of the public welfare; they may, within extremely broad limits, control practices so long as specific constitutional prohibitions are not violated and so long as conflicts with valid and controlling federal laws are avoided. That is the essence of *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, *Nebbia* v. *New York*, 291 U. S. 502, *Olsen* v. *Nebraska* 313 U. S. 236, *Lincoln Union* v. *Northwestern Company*, 335 U. S. 525, and *California Auto Insurance Association* v. *Maloney*, 341 U. S. 105 * * * If our recent cases mean anything, they leave debatible issues as respects, business, economic and social affairs to legislative decisions. We could strike down this law only if we returned to the philosophy of the Lochner and Coppage cases."

In 1955, the Supreme Court decided *Williamson* v. *Lee Optical*, 348 U. S. 483. The Court was faced with a challenge to an Oklahoma statute requiring only a licensed optometrist or opthamologist to fit lenses, prohibiting the renting of space in establishments to other than

those two groups for eye examinations or visual care and prohibiting advertising of such services. The Court met the challenge by unanimously determining that the statute was valid and constitutional. It stated:

> "The law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.
>
> "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws regulatory of business and industrial conditions because they may be unwise, improvident or out of harmony with a particular school of thought. (The Court then cited Nebbia, West Coast Hotel, Olsen, Lincoln Union, Daniel and Day-Brite). * * *
>
> "It is an attempt to free the profession, to as great an extent as possible, from all taints of commercialism."

In *McGovern et al.* v. *Maryland*, 366 U. S. 420 (1961), the Supreme Court, again with just one dissenting voice, upheld the constitutionality of the Maryland Sunday Closing law. Citing the *Semler* and *Lee Optical* cases, the Court said:

> "State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

In line with *Douglas* v. *Noble*, 261 U. S. 165, 43 Ct. 303, 67 L. Ed. 590, and *Graves* v. *Minnesota*, 272 U. S. 425, 47 S. Ct. 122, 71 L. Ed. 331, the Court has held

that a state, by insisting upon the personal obligations of the individual, may deny the right to practice dentistry to corporations, *Miller* v. *State Board of Dental Examiners of State of Colorado*, (1932) 287 U. S. 563, 53 S. Ct. 6, 77 L. Ed. 496, may prohibit dentists from advertising or having any kind of publicity, *Semler* v. *Oregon State Board of Dental Examiners*, (1935) 294 U. S. 608, 55 S. Ct. 570, 79 L. Ed. 1086, and may prohibit the selling of eyeglasses at any retail store without the personal attendance of a physician or optometrist, *Roschen* v. *Ward*, (1929) 279 U. S. 337, 49 S. Ct. 336, 73 L. Ed. 722.

And, in connection with chiropractic:

> "Indeed the burden upon the plaintiffs is great, if not insurmountable. They must show that the Act as administered 'has no rational relation' to the regulation of chiropractic and 'therefore is beyond constitutional bounds.' Williamson v. Lee Optical Company, supra, 348 U. S. 483, 491, 75 S. Ct. 461, 466."
>
> *England* v. *Louisiana State Bd.*, 263 F. 2d 661, 669-70, 671-2, 674 (1959).

On April 22, 1963 the United States Supreme Court again refused to follow the "yellow dog" cases. In a case involving a statute prohibiting anyone but a lawyer from engaging in the business of debt adjusting, the court again reviewed the *Lochner*, *Coppage* and allied cases and again rejected them, citing once more *Lincoln Federal Labor Union* v. *Northwestern Iron and Metal Co.*, 335 U. S. 525, 536 (1949) and *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 488 (1955) and saying:

> "The doctrine that prevailed in Lochner, Coppage, Adkins, Burns, and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long

since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. As this Court stated in a unanimous opinion in 1941, 'We are not concerned * * * with the wisdom, need, or appropriateness of the legislation.' Legislative bodies have broad scope to experiment with economic problems, and this Court does not sit to 'subject the State to an intolerable supervision hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure.' It is now settled that States have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law.

In the face of our abandonment of the use of the 'vague contours' of the Due Process Clause to nullify laws which a majority of the Court believed to be economically unwise, reliance on *Adams* v. *Tanner* is as mistaken as would be adherence to *Adkins* v. *Children's Hospital*, overruled by *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379 (1937). Not only has the philosophy of Adams been abandoned, but also this Court almost 15 years ago expressly pointed to another opinion of this Court as having clearly undermined Adams. We conclude that the *Kansas Legislature was free to decide for itself that legislation was needed to deal with the business of debt adjusting.* Unquestionably, there are arguments showing that the business of debt adjusting has social utility, but such arguments are properly addressed to the legislature, not to us. We *refuse to sit as a 'superlegislature to weight the wisdom of legislation,' and we emphat-*

ically refuse to go back to the time when courts used the Due Process Clause 'to strike down state laws regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.' Nor are we able or willing to draw lines by calling a law 'prohibitory' or 'regulatory.' Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours. The Kansas debt adjusting statute may be wise or unwise. But relief, if any be needed, lies not with us but with the body constituted to pass laws for the State of Kansas.

Nor is the statute's exception of lawyers a denial of equal protection of the laws to non-lawyers. Statutes create many classifications which do not deny equal protection; it is only 'invidious discrimination' which offends the Constitution. The business of debt adjusting gives rise to a relationship of trust in which the debt adjuster will, in a situation of insolvency, be marshalling assets in the manner of a proceeding in bankruptcy. The debt adjuster's client may need advice as to the legality of the various claims against him, remedies existing under state laws, governing debtor-creditor relationships or provisions of the Bankruptcy Act—advice which a nonlawyer cannot lawfully give him. If the State of Kansas wants to limit debt adjusting to lawyers, the Equal Protection Clause does not forbid it * * *" (Emphasis added).

Ferguson v. *Skrupa*, 372 U. S. 726, 10 L. Ed. 2d 93 (1963).

The *Liggett* philosophy upon which Plaintiff's claims of unconstitutionality are based, has been abandoned by federal and state courts alike.

Plaintiff should appeal to the legislature rather than to the courts. As was stated by the Supreme Court of Indiana in *Tinder* v. *Clarke Auto Co.*, 149 N. E. 2d 808, 819 (1958):

> "If persons adversely affected by the acts of the legislature consider that the laws enacted to be ill-conceived, unreasonable or oppressive by requiring too great a 'price to be paid for living in a well-ordered society' they should seek relief from the legislature which enacted the law. They should not call upon the courts to invalidate laws merely because they consider such laws to be oppressive, if rightfully enacted within the scope of legislative authority. For us to yield to this demand would be to destroy the very framework of our government."

See McCloskey, Economic Due Process and the Supreme Court: An Exhumation and Reburial, 1962 Sup. Ct. Rev. 34, which presents a comprehensive review of this particular issue.

We submit that the relationship to the public welfare of the statute in question is at the very least debatable, and this alone is sufficient to uphold the statute as being constitutional.

What is the evil which the statute seeks to alleviate? It is the divorcing of the ownership and control of the prescription department of the pharmacy from the professional standards and ethics to which registered pharmacists ascribe.

How does the law seek to correct this evil? By providing an opportunity for professional standards and ethics to have a voice in connection with the management of the business, purchasing policies, services offered, customer relations, quality of service, cooperation with the medical

profession for the public good and providing freedom to make professional decisions without commercial restraint.

We submit that the philosophy of the *Liggett* case has been clearly abandoned and this appeal presents an opportunity for the Supreme Court to make this change in philosophy absolutely clear to all.

Pharmacy As a Profession

In the petitioner's brief on page 22, we have argued that pharmacy is a profession and that as such should be treated the same as other professions which courts have determined cannot be owned or controlled by lay people or nonprofessionals.

The National Association of Chain Drug Stores, Inc., in their amicus curiae brief in support of the respondent on page 3, does not quarrel with the concept that a pharmacist is a "professional."

The respondent apparently recognizes pharmacy as a profession, however on page 23 of their brief, they state as follows:

> "Unlike pharmacies and drug stores, dentistry, optometry, medicine, and other similar professions involve close personal contact between the person seeking the service and the person giving the service. In many, if not most, cases of drug purchases, the purchasers do not even know the druggist, and certainly have very little personal contact with him."

This perhaps is the case with the nonpharmacist owned pharmacies and chain store pharmacies, but as we all know from personal experience, you do develop a close personal relationship with your pharmacist. It just happens that a pharmacist owner of a store has a more permanent position with the store than a nonowner pharmacist or a chain

store pharmacist who is often transferred or frequently changes employment. The transient nature of chain store pharmacists does not promote a close personal relationship with the client.

There is very close personal contact between the pharmacist and his clients and customers just as there is in other professions.

As stated on page 10 of the joint amicus curiae brief filed by the A. Ph. A. and the N. A. R. D., many pharmacists, as a professional service, maintain a patient medication monitor system and this system is now required by statute in New Jersey. It should be pointed out that many pharmacists offer this service on a voluntary basis as an additional service, although very few nonpharmacist controlled stores do this.

As part of this system, the pharmacy maintains a patient profile card which contains all the prescription drugs, the amount, the prescribing physician's name, and the date the prescription was filled. The pharmacist records all of the required information from the prescription on to the profile card. By a thorough examination of the profile card the pharmacist can see if there are any obvious drug incompatibilities (there are hundreds of possible incompatibilities which occur between one drug and other drugs, and between drugs and food or beverages). This is one of the most important functions a pharmacist can perform since he is in the unique position of being able to review all the drugs a patient has received from all the physicians the patient has seen from the prescriptions filled in that pharmacy.

> "In an age of medical specialization it is not unusual for a patient to visit within a short time a family doctor who prescribes an antibiotic for a strep throat, a psychiatrist who prescribes a tranquilizer, and a

dentist who prescribes a painkiller. Some of these medications are compatible with each other and can be taken concurrently. But there are notable and alarming exceptions. For example, certain of the anti-coagulant drugs used after a heart attack, in combination with aspirin, may increase the tendency toward internal bleeding. Some antihistamines, taken along with tranquilizers, may produce dangerously soporific effects.

The physician knows the dangers of drug antagonism, but is not always aware of all the medications that a patient may be taking, especially those bought without prescription. The patient knows what he is taking, but is rarely aware of the dangers. But *there is someone in a position to know both the drugs being taken and the harm that wrong combinations can cause: the pharmacist.* By keeping a medication profile of each steady customer and referring to it each time he fills that customer's prescriptions or sells him over-the-counter drugs, he can prevent the possibility of a harmful reaction." (Emphasis added) Time Magazine, March 5, 1973 at page 73.

A close personal contact with the client or customer is necessary to make the patient medication monitor system work effectively.

After the prescription is filled, the pharmacist must establish that the patient has been instructed how the medication is to be taken and what side effects the patient should be aware of.

The following are a few examples of what can and has happened when the patient has not been told how the medication is to be taken: patients who have had earaches have gone to a physician who has placed reconstituted oral penicillin into their ear, patients who have drunk alcoholic

beverages died after taking sleeping pills because of the potentiation of the two central nervous system depressants.

If a drug prescribed for the treatment of depression is taken and certain foods, beverages, or drugs are then ingested, it is very possible that the patient could suffer a hypertensive crisis and die.

It is very common for the physician not to tell the patient anything about the drug or the side effects which could occur from it. A close personal contact with the pharmacist and the patient is required to inform and advise the patient on use of the medication and possible side effects.

Additional procedures taken by the pharmacist in filling a prescription which require close personal contact with the customer are as follows:

1. The pharmacist must check to see that the name the physician wrote on the prescription is actually the name of the patient.

2. The pharmacist must determine if the patient is an adult or a child. If the patient is a child, the dosage becomes very important. The dosage of drugs is calculated on the bases of age or weight. If a child is given the adult dosage by mistake, the result could be fatal. The pharamacist is often asked by the physician to calculate the correct dosage for a child. The pharmacist must also determine that the dosage prescribed is the usual dosage for a patient of that age or weight.

In recent years, physicians have encouraged pharmacists to have a closer contact with patients in clinical settings. The pharmacist functions as a drug therapy consultant and keeps patient records which enable him to alert the attending physician of possible drug interactions and

reactions and to provide him with detailed information about each drug.

The patient must thoroughly understand the proper care and use of the prescription drug so he can correctly perform adequate self-administration.

The pharmacy schools in the United States in recent years have placed great emphasis on pharmacist-patient contact and the responsibility to see that the patient knows the essential information necessary to receive the maximum therapeutic benefit from the medication supplied to him by the pharmacist and to reduce the danger of improper use and harmful side effects.

In addition, the pharmacy schools in the United States and the profession of pharmacy have placed great emphasis on an expanded area of professional service in a clinical role for the pharmacist, referred to as "clinical pharmacy." This would involve the pharmacist as part of the health care team with doctors and nurses, wherein the pharmacist would act in an expanded role as a drug consultant. In a hospital or clinic, a pharmacist would be available in the patient-care area twenty-four hours a day. The pharmacist would take the patient's drug history on admission and instruct him in home use of prescribed medication on dismissal. During the patient's hospitalization, the pharmacist would maintain a complete pharmaceutical service record, monitor drug therapy, and relate it to clinical laboratory tests and adverse drug reactions. He would be available for consultation with the physician who plans the drug regimen; and he would assist the nurse in the management of the drug requirements involved in patient care plans for which she is responsible. In addition, the pharmacist becomes a readily accessible source of drug information. He is responsible for the analysis and confirmation of drug orders as well as the filling of these orders;

and he is available to the nurse prior to the time of drug administration.

The curriculum in schools of pharmacy has changed a great deal since 1967, with a much greater emphasis on patient care with emphasis on drug therapy. Clinical pharmacy will develop a greater patient-oriented attitude, and will involve much greater patient contact.

We feel that the cases in various states holding that a state may prohibit the practice of a profession by a professionally unqualified corporation through qualified and registered employees are equally applicable to the profession of pharmacy.

> "Indiana—*Bennett* v. *Indiana State Board of R. and E. in Optometry*, (1937) 211 Ind. 878, 7 N. E. 2d 977.
>
> Massachusetts—*McMurdo* v. *Getter*, (1937) 298 Mass. 363, 10 N. E. 2d 139; *Kay Jewelry Co.* v. *Board of Registration in Optometry*, (1940) 305 Mass. 581, 27 N. E. 2d 1.
>
> Pennsylvania—*Neill* v. *Gimbel Bros.*, (1938) 330 Pa. 213, 199 A. 178.
>
> Construing a statute as prohibiting a corporation from practicing optometry, directly, or indirectly, and from employing registered optometrists to examine the eyes of its customers was held in Neill v. Gimbel Bros., (1938) 330 Pa. 213, 199 A. 178 not to make the act unconstitutional as contravening the Fourteenth Amendment to the Federal Constitution. The court, which classified Optometry as a profession, said that the legislature had the right to forbid such practice as contrary to public policy, and pointed out that one who practices a profession is apt to have less regard for professional ethics and to be less amenable to regulations for their enforcement when he has no contractual ob-

ligations to the client, does not fix or receive the employment, and is under the control of an employer whose commercial interest is in the volume of sales of merchandise effected by the prescriptions of the employee-practitioner."

22 A. L. R. 2d 950.

"It is generally held that, in the absence of express statutory authority a corporation or individual not licensed to practice optometry cannot practice optometry through a licensed employee."

102 A. L. R., 343n (1936);

See also 128 A. L. R., 585n.

"If such a course were sanctioned, the logical result would be that corporations and business partnerships might practice law, medicine, dentistry, or any other profession, by the simple expedient of employing licensed agents. And if this were permitted, professional standards would be practically destroyed, and professions requiring special training would be commercialized, to the public detriment. The ethics of any profession is based upon personal or individual responsibility. One who practices a profession is responsible directly to his patient or his client. Hence, he cannot properly act in the practice of his vocation as an agent of a corporation or business partnership, whose interests in the very nature of the cases are commercial in character."

Ezell v. *Ritholz*, (1938) 188 S. C. 39, 198 E. S. 419.

"As will appear from the subsequent discussion of the cases, there is no judicial dissent from the proposition that a corporation cannot practice law."

73 A. L. R., 328n.

"Since a corporation cannot practice law directly, it cannot do so indirectly by employing competent lawyers to practice for it, as that would be an invasion which the law would not tolerate. (citing cases)."

73 A. L. R., 1331n (1931).

Nor may a corporation practice medicine, surgery or dentistry through licensed employees.

"The majority, though not all, of the decisions on the subject hold that neither a corporation nor any other unlicensed person or entity may engage in the practice of medicine, surgery, or dentistry through licensed employees."

103 A. L. R., 1240n (1936).

"It has been recognized by the professions, by statutes and by decisions that a corporation offering professional services is not placed beyond legislative control by the fact that all services in question are rendered by qualified members of the profession.

"Liggett Co. vs. Baldridge, supra, is not parallel with the case at bar. We find nothing in that case which conflicts with the well-established rule that the State may deny to corporations the right to practice professions and insist upon the personal obligations of individual practitioners. Semler v. Dental Examiners, 294 U. S. 608; Winberry v. Hallihan, supra; People v. Peoples Stock Yards Bank, supra; People v. Painless Parker, Dentist, supra; Parker v. Board of Dental Examiners, supra."

Peo. v. *United Medical Service*, 362 Ill. 442, 455-6
200 N. E. 157 (1936).

Other states have recognized, as has North Dakota, that it may be necessary to *regulate ownership*, from which comes the instructions as to how the professional man shall practice his profession, ownership being the *controlling factor.*

> "An examination of the contract between the defendant corporation and its employee Jacobs shows the lack of Jacobs' control, for the company can dispense with his services on ten days notice whenever it concludes he is not producing enough sales of glasses to those referred to him for tests of the eyes. It likewise shows that Jacobs has nothing to do with the prices fixed for the sale of glasses, and for his own services to the customer he is paid by the company and not by the customer. *There is an entire lack of the relation that ordinarily exists between a professional man and his client.*" (Emphasis added).
>
> *State of Kansas* v. *Goldman Jewelry,* 142 Kans. 881, 51 P.2d 995, 102 A. L. R., 334 (1935).

As was said in *People* v. *Carroll,* 274 Mich. 451, 264 N. W. 861:

> "It is a well-known fact that in the profession of dentistry the services rendered are personal and call for knowledge in a high degree and that to *separate this knowledge from the power of control is an evil,* the correction of which was attempted by the instant legislation. The evils which arise from the divorcing the 'power of control' from 'knowledge' apply with equal force to a partnership as well as a corporation." (Emphasis added).
>
> *Lewis* v. *State Bd. of Dentistry,* 277 Mich. 334, 269 N. W. 194; and
>
> *Toole* v. *State Bd.,* 300 Mich. 180, 1 N. W. 2d 502, appeal dismissed 316 U. S. 648, 86 L. Ed. 1731

It should be noted again that many states have specifically, by statutory enactment and case law, designated pharmacy as a profession.

Colo. Rev. Stat. of 1953, Sec. 48—1-26;

Conn. 1961 P. A. 149, Gen Stat. Supp., Sec. 20-175;

Idaho Code, Sec. 54-1708;

Illinois Ann. Stat., 91 Sec. 55 (adopted 1955);

Kansas Gen'l Stat. Supp., Sec. 65-1641, 1642 (1953);

Louisiana Stat. Ann., Sec. 37-1197;

Maryland Code, Art. 43, Sec. 251;

Maine Rev. Stat., of 1954, Chapt. 68, Sec. 1;

Mass. Stat., C112 Sec. 42A (1960);

Minn., M. S. A. 151.06,6 (e);

Miss. Code, 1942 Sec. 8847;

Mo. Rev. Stat. Cum. Supp. 1961, Sec. 338.050;

Nebraska Rev. Stat., 1943, 1961 Cum. Supp. Sec. 71-101, 102;

Nevada Rev. St., Sec. 639.070 and 639.210;

New Mexico Stat. 1953, Sec. 67-9-10 (a);

McKinney's Consol. L. of N. Y. Anno. Book 16, Part 3 p. 89 and Sec. 6804g

No. Carolina Gen. Stat., Sec. 90-54;

Pages Ohio Rev. Code Anno., Sec. 4729.13;

Oklahoma Stat. Ann., Sec. 353.7 and Sec. 353.18 (b), Sec. 353.20, Sec. 353.26;

New Jersey S. A., 45:14-32.

California enacted a statute in 1955:

> "4606. Pharmacy a profession. In recognition of and consistent with the decisions of the appellate courts of this State, the Legislature hereby declares the practice of pharmacy to be a profession." Business and Professions Code, Sec. 4046.

> "We hold that under the facts in this case the pharmacist was practicing a profession * * * The practice of the profession of pharmacy is a part and parcel of the system of practice of modern medicine." *Boudot* v. *Schwallie*, 178 NE 2d 599 (Ohio 1961).

From the foregoing, it would seem to be undisputed that not only is the practice of pharmacy universally recognized as a profession, but that the store in which it is practiced and all of the surrounding factors which are provided by management are a proper subject for regulation under the police power of the several states. As a profession, pharmacy and the control thereof through ownership are intimately related to the public health and welfare.

The very inability of the respondent in this case to understand the importance of professional motivation in the control of the pharmacy and its efforts to disparage the profession as compared with others point up the damages which the legislature has sought to alleviate.

We can see no reason to treat the profession of pharmacy different than other professions which are not permitted to be owned and controlled by nonprofessionals or lay people.

Corporate Policy Prevents the Pharmacist from Practicing His Profession

The petitioner was not given the opportunity to present evidence relating to the statute in question to the public health, safety, and welfare since the case and questions of fact were decided by the trial court on a motion for summary judgment. We do believe that our arguments on this point are supported by facts and proper evidence would have been presented to the trial court.

The respondents point out that chain drug stores controlled 60.1% of the total national drug sales volume in 1972.

The sole purpose of chain drug stores or nonpharmacist controlled drug stores is to make money for its shareholders. The corporate policies of these stores are geared to make money and to do this certain professional services must be omitted.

We believe that certain corporate policies of the nonpharmacist controlled pharmacies are a detriment to the public health, safety, and welfare.

The prescription department is used by these stores as a loss leader just to bring in customers to buy their sundries, such as grass seed and furnace filters.

Because the advertising campaign of the chain drug store is based solely upon price, the public gets the impression that the only difference between one drug store and another is the price one pays for the drugs he receives. The customer in many cases is not aware of the additional and necessary services provided by a pharmacy which is pharmacist controlled. The small independent drug store cannot afford to lose money on the prescriptions he sells and offer the additional professional services because he cannot make it up on grass seed and furnace filters which he doesn't carry.

The chain drug stores keep their overhead down by keeping the inventory down and by purchasing the cheapest drugs available. Keeping the inventory down is accomplished by carrying in inventory only the fast moving prescription drugs. This results in certain drugs not being available to the public in such a store. These stores often purchase the cheapest generic drugs available.

Generic drugs may in many or most cases be equivalent, however, they are often manufactured by unknown

companies, where the possibilities of recall for defects is greater. The pharmacist should be allowed to purchase his prescription drugs from the manufacturer in whom he has confidence rather than being forced by nonprofessional owners to buy from a company he has never heard of just because their prices are lower.

Another method used by nonpharmacist controlled pharmacies to keep the overhead down is to keep the personnel or number of pharmacists down. It is not uncommon in such a store for a pharmacist to work the prescription department by himself and fill 80-100 prescriptions per day while also answering all incoming calls, acting as cashier and acting as stockboy in unrelated departments.

Because the corporation runs the prescription department with a minimum of personnel, it is not unusual that the pharmacist does not get a chance to take a lunch hour or to take a break during an 8 to 12 hour shift. Since dispensing medication is precise work, mental fatigue occurs and this condition is aggravated by no breaks, no food, and long hours. When mental fatigue occurs, the possibility of making mistakes increases.

Understaffing the pharmacy department to the point where the pharmacists must cut corners to keep up with the workload presents great danger to the public welfare. Often this results in refilling a prescription without first obtaining permission to do so from the physician. This practice is widespread and very hazardous to the public health.

Most pharmacists work for corporations which are nonpharmacist controlled. The corporate policies do not allow the pharmacist enough time to perform his professional services because he is forced to spend his time doing mundane chores that could be delegated to a clerk or stockboy. As a result of this misappropriation of time, the

pharmacist is not fulfilling the vital role he should be playing in the health care field. The result is that adverse drug reactions go unnoticed and the patient is not informed of the possible side effects to watch for or how to properly take the medication.

The philosophy of the owners of a drug store has a direct bearing on the quality of pharmaceutical service that is offered and the quality of drugs dispersed. The motivation of a professional man is different from that of a nonprofessional, particularly with regard to matters of stock turnover, sales volume, percentage of profit, number of pharmacists employed, and time available to confer with patients and doctors.

There is a conflict between commercial motivation and the ethical standards of the pharmacy profession. There would be a greater tendency toward substitution of one brand for another, and unauthorized filling and refilling of prescriptions in stores where there is no pharmacist ownership. Nonpharmacist owned stores sometimes refuse to compound prescriptions or to fill prescriptions at all. The conflicts between the commercial and professional aspects endanger the public health and safety and pharmacist employees of nonpharmacist owned stores could be influenced by the owners and such pharmacists are not free to make their own professional decisions. The operation of the pharmacy should be as much as possible entirely under the control of a pharmacist.

It is submitted that corporate policies in nonpharmacist controlled corporations, some of which have been set out herein, have prevented the pharmacist from effectively practicing his profession to the detriment of the public health, safety, and welfare.

The pharmacist in such a store is required to do so many nonprofessional services that he has no time to per-

form the professional services which are vital to safe drug distribution.

Other Matters Raised by Respondent's Briefs

We would admit that some nonpharmacist owned corporations which own drug stores conduct them in an ethical and professional manner. Laws such as the one we are concerned with in North Dakota are not passed to control those who are innately good citizens, but, rather, for the minority, who pose a real danger to the health and safety of the public. The point is, however, that nonpharmacist ownership results in greater probability of nonprofessional conduct and the pressures of commercialism are more apt to influence a policy-making and business-controlling nonprofessional than they are to influence a professional man in a similar position.

Argument is made by the National Association of Chain Drug Stores, Inc. that the chief benefit of chain drug stores is lower prices for prescription drugs. It may be that prescription drug prices are lower in chain drug stores, however, the primary reason for lower prices is that they do not offer the many necessary professional services to the public offered by other pharmacies, such as delivery of prescription drugs, patient medication monitory systems, open charge accounts, emergency and after hour service and consultation regarding side effects of various medication.

The respondent argues that since the State Board of Pharmacy failed to produce any evidence at any stage of the North Dakota proceedings tending to establish a relationship between the statute and the public welfare, that the trial court decision must stand.

As we have pointed out before, the petitioner did not have the opportunity to present such evidence. The ap-

plication for a pharmacy permit was denied by the administrative agency without a hearing because the appellant did not comply with the statute in question. No hearing by the administrative agency was necessary because at that point there was no constitutional question before the petitioner.

Upon appeal to the trial court, the respondent made a motion for summary judgment which precluded the petitioner from presenting evidence as to the relationship of the statute to the public welfare. We submit that the question of whether the statute is related to the public health, welfare, and safety is a fact question not properly decided on a motion for summary judgment. In addition, the petitioner was entitled to rely on the presumption that a statute is constitutional and the burden was on the respondent to rebut this presumption. The affidavits presented to the trial court in support of its motion for summary judgment do not pertain to the question of the relationship of the statute to the public welfare and clearly fail to rebut the presumption of constitutionality or shift the burden of proof to the petitioner on said motion for summary judgment. The trial court clearly erred in granting the motion for summary judgment in view of the presumption of constitutionality of the statute and the questions of fact present on this issue.

Respondents state that North Dakota is the only jurisdiction to have a pharmacist ownership or control restriction statute.

As pointed out in our brief, Michigan still has a 25% pharmacist ownership requirement, New York and Pennsylvania had a 100% ownership requirement until such statutes were declared unconstitutional by the *Liggett* case, and California, Maryland and Pennsylvania have statutes prohibiting physician ownership of pharmacies. In addi-

tion, New York, a recent session of its legislature, passed a statute similar to the one in question in North Dakota, however, the proposed statute was vetoed by the Governor of New York. Other states have similar type regulations.

Respondents point out on page 22 of their brief that the single argument offered to the North Dakota legislators to sustain the statute in question was to prohibit physician owned pharmacies and respondent then admits that this is a desirable restriction. If the North Dakota legislature decided that the statute in question was a proper way to restrict physician ownership of pharmacies, we do not feel that the United States Supreme Court will decide to sit as a super-legislature and decide that North Dakota should have written the statute differently. The statute has obtained its desired objective and does protect the public health, safety, and welfare.

Under the present standard of review of the Supreme Court such state statutes enacted under the power of the state to protect the public health, safety, morals or general welfare are presumed constitutional, with the presumption of facts before the Legislature to go with it, and only a very strong showing by those challenging the statute would cause the Court to declare a statute unconstitutional.

CONCLUSION

The philosophy of *Liggett* v. *Baldridge* upon which respondent's claims of unconstitutionality are based, has been abandoned by federal and state courts alike.

When a nonprofessional controlled corporation controls, and thereby practices a health profession, such as pharmacy, it forces its policies on the professional, thus prohibiting him from making the value judgments which

only he is qualified, by his education and professional responsibility to make. State laws which set out the qualifications for an individual to practice pharmacy which are enacted to protect the public health, welfare, and safety, must not be allowed to be circumvented by nonprofessional controlled corporations.

The holding by this court in the *Liggett* v. *Baldridge* case should be clearly reversed at this time and since the North Dakota Supreme Court based its decision entirely on the *Liggett* decision, the North Dakota Supreme Court decision should be reversed to conform to the current philosophy of the United States Supreme Court.

Respectfully submitted,

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NORTH DAKOTA STATE BOARD OF PHARMACY *v.* SNYDER'S DRUG STORES, INC.

CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA

No. 72-1176. Argued November 6, 1973—
Decided December 5, 1973

The North Dakota Supreme Court, relying on *Liggett Co.* v. *Baldridge*, 278 U. S. 105, held unconstitutional a state statute, under which respondent had been denied a pharmacy operating permit, requiring that an applicant for such a permit be "a registered pharmacist in good standing" or "a corporation or association, the majority stock in which is owned by registered pharmacists in good standing, actively and regularly employed in and responsible for the management, supervision, and operation of such pharmacy." The court remanded the case so that petitioner Board could conduct an administrative hearing "*sans* the constitutional issue," on respondent's alleged failure to meet certain structural and safety standards on which petitioner had also rested its permit denial. *Held:*

1. This Court does not lack jurisdiction to review the State Supreme Court's judgment, which is "final" within the meaning of 28 U. S. C. § 1257, for it is not apparent how petitioner Board would be able to preserve the constitutional issue now ready for adjudication without defying the State Supreme Court. Pp. 159–164.

2. The North Dakota statutory requirements for permitting the operation of a pharmacy do not violate the Due Process Clause of the Fourteenth Amendment. In enacting the challenged legislation the State was well within its authority "to legislate against what [it] found to be injurious practices in [its] internal commercial and business affairs," *Lincoln Union* v. *Northwestern Co.*, 335 U. S. 525, 536, and this Court will not substitute its own judgment for what the State feels is reasonably necessary to protect the interests of the public. *Liggett Co.* v. *Baldridge*, *supra*, overruled. Pp. 164–167.

202 N. W. 2d 140, reversed and remanded.

DOUGLAS, J., delivered the opinion for a unanimous Court.

A. William Lucas argued the cause and filed briefs for petitioner.

Mart R. Vogel argued the cause and filed a brief for respondent.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

North Dakota passed a statute [1] that requires that the applicant for a permit to operate a pharmacy be

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**Arthur B. Hanson, Ralph N. Albright, Jr.*, and *Sidney Waller* filed a brief for the American Pharmaceutical Assn. et al. as *amici curiae* urging reversal.

Thomas D. Quinn, Jr., and *Harold Rosenwald* filed a brief for the National Association of Chain Drug Stores, Inc., as *amicus curiae* urging affirmance.

[1] N. D. Cent. Code § 43-15-35 (5) (Supp. 1973) provides:

"*Requirements for permit to operate pharmacy.*—The board shall issue a permit to operate a pharmacy, or a renewal permit, upon satisfactory proof that:

. . . . .

"5. The applicant for such permit is qualified to conduct the pharmacy, and is a registered pharmacist in good standing or is a partnership, each active member of which is a registered pharmacist in good standing, or a corporation or association, the majority stock in which is owned by registered pharmacists in good standing, actively and regularly employed in and responsible for the management, supervision, and operation of such pharmacy . . .

. . . . .

"The provision of subsection 5 of this section shall not apply to the holder of a permit on July 1, 1963, if otherwise qualified to conduct the pharmacy, provided that any such permit holder who shall discontinue operations under such permit or fail to renew such permit upon expiration shall not thereafter be exempt from the provisions of such subsection as to such discontinued or lapsed permit. The provisions of subsection 5 of this section shall not apply to hospital pharmacies furnishing service only to patients in such hospital."

"a registered pharmacist in good standing" or "a corporation or association, the majority stock in which is owned by registered pharmacists in good standing, actively and regularly employed in and responsible for the management, supervision, and operation of such pharmacy."

Petitioner Board denied a permit to Snyder's Drug Stores, Inc., because it did not comply with the stock-ownership requirements of the statute, it appearing that all the common stock of Snyder's was owned by Red Owl Stores and it not being shown if any Red Owl shareholders were pharmacists registered and in good standing in North Dakota. On appeal to the state district court, summary judgment was granted Snyder's. On appeal to the Supreme Court of North Dakota, that court held[2] that the North Dakota statute was unconstitutional by reason of our decision in 1928 in *Liggett Co.* v. *Baldridge*, 278 U. S. 105. That case involved a Pennsylvania statute that required that 100% of the stock of the corporation be owned by pharmacists. The North Dakota statute, however, requires only that a majority of the stock be owned by pharmacists. But the North Dakota Supreme Court held that the difference did not take this case out from under the *Liggett* case because under both statutes control of the corporation having a pharmacist's license had to be in the hands of pharmacists responsible for the management and operation of the pharmacy. That court therefore remanded the case, so that the Board could conduct "an administrative hearing on the application, *sans the constitutional issue*, pursuant to our Administrative Agencies Practice Act," 202 N. W. 2d 140, 145 (italics added).

The case is here on a petition for certiorari which we granted, 411 U. S. 947.

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[2] 202 N. W. 2d 140.

I

We are met at the outset with a suggestion that the judgment of the Supreme Court of North Dakota is not "final" within the meaning of 28 U. S. C. § 1257 which restricts our jurisdiction to review state court decisions.[3]

The finality requirement of 28 U. S. C. § 1257, which limits our review of state court judgments, serves several ends: (1) it avoids piecemeal review by federal courts of state court decisions; (2) it avoids giving advisory opinions in cases where there may be no real "case" or "controversy" in the sense of Art. III; (3) it limits federal review of state court determinations of federal constitutional issues to leave at a minimum federal intrusion in state affairs.

Mr. Justice Frankfurter, writing for the Court in *Radio Station WOW* v. *Johnson*, 326 U. S. 120, 124, summarized the requirement by Congress that in appeals from federal district courts as well as in review of state court decisions the judgments be "final": "This requirement has the support of considerations generally applicable to good judicial administration. It avoids the mischief of economic waste and of delayed justice. Only in very few situations, where intermediate rulings may carry serious public consequences, has there been a departure from this requirement of finality for federal appellate jurisdiction. This prerequisite to review derives added force when the jurisdiction of this Court is invoked to upset the decision of a State court. Here we are in the realm of potential conflict between the courts of two different governments. And so, ever since 1789, Congress has granted this Court the power to intervene in State litiga-

[3] "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court . . . ." 28 U. S. C. § 1257.

tion only after 'the highest court of a State in which a decision in the suit could be had' has rendered a 'final judgment or decree.' § 237 of the Judicial Code, 28 U. S. C. § 344 (a). This requirement is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system."

But, as he pointed out, this concept of "finality" has a "penumbral area." *Ibid.* Speaking for the Court in that case, he held that Nebraska's ruling on the legality of a radio license issued by the federal commission could be reviewed even though the state court had not yet determined the final accounting. He stated: "Of course, where the remaining litigation may raise other federal questions that may later come here . . . to allow review of an intermediate adjudication would offend the decisive objection to fragmentary reviews." *Id.*, at 127.

Mills v. *Alabama*, 384 U. S. 214, involved the constitutionality of a state statute making it a crime for an editor on election day to urge people to vote a certain way on the issues being submitted. The state court held the act did not violate the Federal Constitution and remanded the case for trial. It was argued that the judgment was not "final" for purposes of 28 U. S. C. § 1257. We noted that the point had "a surface plausibility, since it is true the judgment of the State Supreme Court did not literally end the case." *Id.*, at 217. We held it "final" however because if the Act were constitutional the editor would in reality have no defense. Since conviction seemed likely, we concluded that to deny review at that stage would "result in a completely unnecessary waste of time and energy in judicial systems already troubled by delays due to congested dockets." *Id.*, at 217–218.

In *Hudson Distributors, Inc.* v. *Eli Lilly & Co.*, 377 U. S. 386, the question on the merits was whether the requirement of a state act setting minimum retail prices was

consonant with federal law. The state court held the state act constitutional under both the State and the Federal Constitutions and remanded the case for further proceedings. In reliance on *Curry* and on *Langdeau* [4] we held that the fact that there were to be further proceedings in the state court did not render the state judgment "nonfinal or unappealable within the meaning of 28 U. S. C. § 1257." *Id.*, at 389 n. 4.

The exceptions noted [5] have a long lineage dating back

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[4] We held in *Local No. 438* v. *Curry*, 371 U. S. 542, that a state court judgment which authorized a temporary injunction against picketing because in the court's view the National Labor Relations Board did not have exclusive jurisdiction was "final" for purposes of 28 U. S. C. § 1257. We did not wait until the litigation had been resolved in the state court, as the state court had finally determined its jurisdiction and erroneously so. *Id.*, at 548.

In *Mercantile National Bank* v. *Langdeau*, 371 U. S. 555, a receiver for a Texas insurance company sued two national banks and the only question tendered on appeal from the state court concerned the question of venue, *viz.*, in what state court a national bank could be sued. It was argued that the state court judgment was not "final" for purposes of 28 U. S. C. § 1257. We rejected that view, holding the judgment "final," saying: "[W]e believe that it serves the policy underlying the requirement of finality in 28 U. S. C. § 1257 to determine now in which state court appellants may be tried rather than to subject them, and appellee, to long and complex litigation which may all be for naught if consideration of the preliminary question of venue is postponed until the conclusion of the proceedings." *Id.*, at 558.

[5] In *California* v. *Stewart*, 384 U. S. 436, 498–499, in a capital case the State Supreme Court set aside the verdict on a federal constitutional ground and directed that the defendant (respondent) be retried. He moved that we dismiss the State's petition, which we had granted, for lack of a "final" judgment. We noted, however, that if on a retrial he were acquitted, there was no appeal available to the State. We therefore held that the judgment under review was "final" for our purposes. *Id.*, at 498 n. 71.

In *Brady* v. *Maryland*, 373 U. S. 83, the state court had given a defendant post-conviction relief and remanded the case for retrial on the question of punishment. We took the case to determine

to Mr. Chief Justice Taney's opinion in *Forgay* v. *Conrad*, 6 How. 201, where the Court held "final" an interlocutory decree requiring a litigant "to deliver up property which he claims," even though a final accounting has yet to be made. *Id.*, at 205. Unless that interlocutory order was deemed "final," Mr. Chief Justice Taney pointed out, the "right of appeal is of very little value to him and he may be ruined before he is permitted to avail himself of the right." *Ibid.*

It is equally important that we treat the judgment in the instant case as "final," for we have discovered no way which the licensing authority in North Dakota has of preserving the constitutional question now ripe for decision.

The Board here denied respondent's application without an evidentiary hearing since the application showed that under the North Dakota Act respondent could in no way qualify for a license. The State Supreme Court held that Act unconstitutional and that thus an applicant failing to meet the requirements of the state statute is nevertheless entitled to consideration for a license. As previously noted, the State Supreme Court, indeed, directed the Board on remand to reconsider the application *"sans"* the constitutional question.

There were state law questions to be considered on the remand, for the state board had also rested its denial of a permit on the failure of Snyder's to meet certain structural and safety standards. The Supreme Court remanded for an administrative hearing on those other issues.

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whether the suppression of evidence by the prosecution entitled the defendant to a retrial on the issue of guilt as well as punishment. We held that the issue of guilt was quite independent of the issue of punishment and that it was time to decide the due process and/or equal protection questions presented by the state decision.

If we deny review at this point, respondent has no constitutional barrier to the grant of a license.

The state licensing authority might, of course, after an administrative hearing reinstate its earlier findings that the respondent does not meet the necessary structural and safety standards. If respondent is denied a license for that reason, the denial will obviously be on a state ground. If respondent is granted a license, the battle over the constitutionality of the new Act will be lost as far as this case is concerned.

There is no suggestion that "the remaining litigation may raise other federal questions," *Radio Station WOW v. Johnson*, 326 U. S., at 127, "such as is true of eminent domain cases." *Ibid.* For in those cases the federal constitutional question embraces not only a taking, but a taking on payment of just compensation. A state judgment is not final unless it covers both aspects of that integral problem. See *Grays Harbor Co.* v. *Coats-Fordney Co.*, 243 U. S. 251, 256.

It would appear that, as a matter of North Dakota procedure, the only way in which the Board could preserve the constitutional issue would be to defy its own State Supreme Court and deny the application on the ground of failure to meet the ownership requirement. The state Administrative Agencies Practice Act provides that: "Any party to any proceeding heard by an administrative agency" may appeal from the decision of the agency. N. D. Cent. Code § 28–32–15. The statute appears to treat the agency as a tribunal and not a "party" able to appeal its own order.

If the Board thus grants the license in accordance with the State Supreme Court decision and then seeks to appeal its own grant on the basis of the validity of the state ownership requirement, the appeal may well be dismissed and the dismissal would rest on the independent

state ground that state procedural law does not provide the agency the right to appeal.

II

Liggett, decided in 1928, belongs to that vintage of decisions which exalted substantive due process by striking down state legislation which a majority of the Court deemed unwise. *Liggett* has to date not been expressly overruled. We commented on it disparagingly, however, in *Daniel* v. *Family Security Life Ins. Co.*, 336 U. S. 220, which concerned the constitutionality of a state statute providing that life insurance companies and their agents may not operate an undertaking business and undertakers may not serve as agents for life insurance companies. We noted that *Liggett* held that it was "clear" that "mere stock ownership in a corporation, owning and operating a drug store, can have no real or substantial relation to the public health; and that the act in question creates an unreasonable and unnecessary restriction upon private business," 278 U. S., at 113. In *Daniel*, however, we stated that "a pronounced shift of emphasis since the *Liggett* case," 336 U. S., at 225, had deprived the words "unreasonable" and "arbitrary" of the meaning which *Liggett* ascribed to them. We had indeed held in *Lincoln Union* v. *Northwestern Co.*, 335 U. S. 525, that a State had power, so far as the Due Process Clause of the Fourteenth Amendment was concerned, to legislate that no person should be denied the opportunity to obtain or retain employment because he was or was not a member of a labor union. After reviewing *Nebbia* v. *New York*, 291 U. S. 502, *Adair* v. *United States*, 208 U. S. 161, and *Coppage* v. *Kansas*, 236 U. S. 1, we said:

> "This Court beginning at least as early as 1934, when the *Nebbia* case was decided, has steadily

> rejected the due process philosophy enunciated in the *Adair-Coppage* line of cases. In doing so it has consciously returned closer and closer to the earlier constitutional principle that states have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law. . . . Under this constitutional doctrine the due process clause is no longer to be so broadly construed that the Congress and state legislatures are put in a strait jacket when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare." 335 U. S., at 536–537.

We reached the same result in *Ferguson* v. *Skrupa*, 372 U. S. 726, where we sustained the constitutionality of a state law prohibiting persons other than lawyers from engaging in the business of debt adjusting and debt pooling. We said:

> "We conclude that the Kansas Legislature was free to decide for itself that legislation was needed to deal with the business of debt adjusting. Unquestionably, there are arguments showing that the business of debt adjusting has social utility, but such arguments are properly addressed to the legislature, not to us. We refuse to sit as a 'superlegislature to weigh the wisdom of legislation,' and we emphatically refuse to go back to the time when courts used the Due Process Clause 'to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.' Nor are we able or willing to draw lines by calling a law 'prohibitory' or 'regulatory.' Whether the legislature

takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours. The Kansas debt adjusting statute may be wise or unwise. But relief, if any be needed, lies not with us but with the body constituted to pass laws for the State of Kansas." *Id.*, at 731–732 (footnotes omitted).

The majority of the Court in *Liggett* for which Mr. Justice Sutherland spoke held that business or property rights could be regulated under the Fourteenth Amendment only if the "legislation bears a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare," 278 U. S., at 111–112. The majority held the Act governing pharmacies "creates an unreasonable and unnecessary restriction upon private business." *Id.*, at 113. The opposed view stated by Mr. Justice Holmes, and concurred in by Mr. Justice Brandeis, was:

> "A standing criticism of the use of corporations in business is that it causes such business to be owned by people who do not know anything about it. Argument has not been supposed to be necessary in order to show that the divorce between the power of control and knowledge is an evil. The selling of drugs and poisons calls for knowledge in a high degree, and Pennsylvania after enacting a series of other safeguards has provided that in that matter the divorce shall not be allowed. Of course, notwithstanding the requirement that in corporations hereafter formed all the stockholders shall be licensed pharmacists, it still would be possible for a stockholder to content himself with drawing dividends and to take no hand in the company's affairs. But obviously he would be more likely to observe the business with an intelligent eye than a casual

> investor who looked only to the standing of the stock in the market. The Constitution does not make it a condition of preventive legislation that it should work a perfect cure. It is enough if the questioned act has a manifest tendency to cure or at least to make the evil less." *Id.*, at 114–115.

Those two opposed views of public policy are considerations for the legislative choice. The *Liggett* case was a creation at war with the earlier constitutional view of legislative power, *Munn* v. *Illinois*, 94 U. S. 113, 132, 134, and opposed to our more recent decisions. *Olsen* v. *Nebraska*, 313 U. S. 236, 241; *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 487–488; *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U. S. 421, as well as the *Daniel*, *Lincoln Union*, and *Ferguson* cases already discussed. The *Liggett* case, being a derelict in the stream of the law, is hereby overruled. We reverse and remand the judgment below and free the courts and agencies of North Dakota from what the State Supreme Court deemed to be the mandate of *Liggett*.

So ordered.